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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

PAUL C. MOYNAHAN,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner Paul C. Moynahan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on April 24, 1973 and amended on May 23, 1973.

I. Citation

A decision of the Connecticut Supreme Court, *State* v. *Paul Moynahan,* Volume XXXIV, No. 43, Conn. L.J., p. 1 (April 24, 1973) (a copy of which is annexed hereto) which decision was amended after a motion for reargument (a copy of which amendment is annexed hereto). Said decision as amended is reported as *State* v. *Moynahan,* — Conn., —, — A.2d — (1973).

II. Jurisdictional Grounds

On April 24, 1973 the Connecticut Supreme Court entered judgment affirming the conviction of Paul Moynahan for the crime of receiving stolen goods. Thereafter on April 30, 1973 in accordance with the Connecticut Rules of Practice, Connecticut Practice Book of 1963, Sections 702 to 704, a motion to reargue was filed which motion was denied on May 23, 1973, except to the extent that the court's decision was amended (as annexed). The jurisdiction of this court is invoked under the authority of 28 U.S.C.A. § 1257(3).

III. Questions Sought to be Reviewed

1. Is a defendant's right of confrontation as guaranteed by the Sixth and Fourteenth Amendments denied when the trial court and prosecutor in a jury trial refuse to grant the defendant's request that a prosecution witness be examined in the jury's absence as to his intention to invoke the Fifth Amendment and thereafter permit repeated invocations of the Fifth Amendment by that witness in the jury's presence?

2. Is a defendant denied his right to a full and fair trial by the trial court's ruling that no evidence may be introduced either by cross-examination or through collateral attack to show the bias, interest or motive of a prosecution witness as to his involvement in the criminal charges under consideration on the ground that such evidence may not be introduced if the witness is not under arrest for such charges?

3. Does the Connecticut rule of evidence that the Best Evidence Rule does not apply to an admittedly verbatim written transcription of the statement of an accused to the police thus permitting the interrogating officer to give con-

tradictory testimony as to his recollection of the contents of that statement violate the defendant's right of confrontation, right to the effective assistance of counsel and right to a full and fair trial?

4. Does the Connecticut rule, which conflicts with holdings in Arizona, California, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, South Carolina and Texas that, notwithstanding the presumption of innocence, it is proper for the court to charge the jury that a criminal accused's testimony is to be weighed in light of his interest in the outcome of the case, a rule which offends that presumption of innocence and violates the accused's basic right to a fair trial?

5. Is an accused denied his right to a full and fair trial when the prosecution, after being ordered prior to trial to reveal all exculpatory evidence including contradictory and inconsistent statements of government witnesses, withholds statements of proposed prosecution witnesses which it knows to be inconsistent with their proposed testimony and contradictory not only with that proposed testimony but also with the proposed testimony of other prosecution witnesses?

6. Does the Connecticut rule which provides that the prosecutor has the sole right to determine what exculpatory evidence shall be turned over to the defense and that the court has no duty to make any *in-camera* inspection to determine compliance offend the accused's basic right to a full and fair hearing?

7. Is the Connecticut one-man grand jury statute, 54 Conn. Gen. Stat. § 47, which permits the Superior Court to appoint a judge, to conduct a hearing, attended by the prosecuting attorney and investigating police officer, the former of whom participates in questioning witnesses, to

inquire into the possible commission of crimes by individuals and to make a public report of its findings, offend minimal due process requirements by virtue of its rule precluding the potential accused from having counsel present, from confronting or cross-examining witnesses and from offering testimony on his own behalf?

8. Is the Connecticut practice, as opposed to the practice in the federal system and in the other forty-nine states, which provides that all prosecutors shall be appointed by the judges of those courts wherein that prosecutor will practice, repugnant to basic concepts of due process?

IV. Constitutional and Statutory Provisions

The defendant relies upon the following provisions of the United States Constitution:

a. With respect to Questions Sought To Be Reviewed, Nos. 1, 2, 5 and 6.

"Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with the witnesses against him; . . . ." Constitution Amendments 6 to 12, U.S.C.A. p. 4 (1972 Edition), and

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

b. With respect to Questions Sought To Be Reviewed, No. 3.

"Amendment V: No person . . . shall be compelled in any criminal case to be a witness against himself, ..." Constitution, Amendment 5 U.S.C.A. p. 4 (1972 Edition), and

"Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with the witnesses against him; . . ., and to have the Assistance of Counsel for his defense." Constitution, Amendment 6, U.S.C.A. p. 4 (1972 Edition).

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty or property, without due process of law . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

c. With respect to Questions Sought To Be Reviewed, Nos. 4 and 8.

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

Also with respect to Questions Sought To Be Reviewed, No. 8, 51 Conn. Gen. Stat. § 175.

"Sec. 51-175. State's attorneys; assistants; practice of criminal law by assistants and superior court clerks. The judges of the superior court shall appoint a state's attorney for each county, who shall act therein as attorney in behalf of the state, a state's attorney at Waterbury, who shall have the same powers and perform the same duties within the judicial district of Waterbury in New Haven county and at all criminal terms of the superior court at Waterbury as the state's attorneys in the several counties, and as many assistant state's attorneys for said counties as the criminal business of the court may require, who, respectively, shall assist the state's attorneys for said counties and for said district in all criminal matters and, in the absence

from the county or district or disability of the state's attorney or at his request, shall have and exercise all the powers and perform all the duties of state's attorney. Each state's attorney appointed to such position after July 1, 1967, shall devote his full time to the duties of his office, shall not engage in the practice of law and shall not be a partner, member or associate of a law firm. They shall receive annual salaries as follows: Twenty-four thousand dollars for the counties of Fairfield, Hartford, New Haven and New London and twenty-two thousand dollars for the counties of Litchfield, Middlesex, Tolland and Windham, and for the state's attorney at Waterbury. The provisions of this section with respect to each state's attorney devoting full time to the duties of his office and not engaging in the practice of law or being a partner, member or associate of a law firm, shall not apply to any incumbent state's attorney for the term of his appointment or reappointment to any new term or terms, at the election of each such state's attorney. Each such state's attorney who so elects shall have his annual salary reduced by five thousand dollars. Each such state's attorney may terminate such election at any time. The comptroller shall deduct from such salaries five per cent thereof as contributions for the purposes of sections 51-49, 51-175a and 51-175b. No assistant state's attorney and no partner or associate of a law firm of which such attorney is a partner or associate and no clerk or assistant clerk of the superior court shall engage in the private practice of criminal law before the superior court for the county in which such attorney or clerk is engaged. The several state's attorneys and assistant state's attorneys shall hold office for two years unless sooner removed by said judges. If any state's attorney or assistant state's attorney neglects to annually ac-

count for and pay over all moneys of the state received by him, his office shall become vacant; and the chief justice of the supreme court or the chief court administrator, on a certificate from the comptroller of such neglect, shall appoint another attorney or assistant attorney in his place, who shall hold office until the next annual meeting of the judges unless sooner removed by them. Said judges may remove any such attorney or assistant attorney from office and may fill any vacancy caused thereby, and they may fill any vacancy in either of said offices which may occur from any other cause. Any judge holding the superior court in any county in which any such vacancy exists may fill it until the next annual meeting of the judges, unless it is sooner filled by the judges at a special meeting. (1949 Rev., S. 7664; June, 1955, S. 3118d; 1963 P.A. 378; February, 1965, P.A. 464; 1967, P.A. 622, S. 1.)" General Statutes of Connecticut, Vol. IX, p. 57 (Revised to 1968).

d. With respect to Questions Sought To Be Reviewed, No. 7.

"Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." Constitution, Amendment 6, U.S.C.A., p. 4 (1972 Edition), and

"Amendment XIV, Section 1: . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Constitution, Amendments 13 to 14, U.S.C.A. p. 33 (1972 Edition).

"Sec. 54-47. Investigations into commission of crime.

Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses may be examined by the judge or state referee conducting the

inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry. (1949 Re., § 8777; 1953, Supp. § 3324d.)" General Statutes of Connecticut, Vol. IX, 545 (Revised to 1968).

V. Statement of the Case

The defendant Paul Moynahan, the Deputy Superintendent of Police for the City of Waterbury, was tried and convicted on a one count substituted information in the Superior Court for New Haven County at Waterbury. This trial resulted from an original two count information charging the defendant with larceny and conspiracy. This information was issued following the defendant's arrest which arrest was based on evidence obtained during a one-man grand jury investigation conducted in Waterbury between March 18, 1969 and June 12, 1969, pursuant to 54 Conn. Gen. Stat. § 47, *supra*. Following the defendant's arrest a series of motions were filed attacking the constitutionality of the proceedings before this one-man grand jury and also attacking the constitutionality of 54 Conn. Gen. Stat. § 47, *supra*, itself.

On September 11, 1969, the defendant moved to quash the information on the ground that during the one-man grand jury proceeding under 54 Conn. Gen. Stat. § 47, *supra*, Captain Wayne Bishop of the Connecticut State Police was present and that by virtue of his presence he participated in the hearings and used evidence obtained therein to obtain a warrant for the defendant's arrest. The motion further claimed that Captain Bishop's presence contravened the limitations of 54 Conn. Gen. Stat. § 47, *supra*, and further that his presence in the grand jury hearing rendered such proceedings violative of the Due Process guaranty of the 14th Amendment. This motion was denied on September 23, 1970, the denial was assigned as error and the issue was considered by the Connecticut Supreme Court, which ruled that his presence was appropriate. (Appendix, pp. 77a-79a, Decision, pp. 2b-3b).

The defendant further attacked the constitutionality of this one-man grand jury proceeding in a Motion to Dismiss filed on September 23, 1969 by reason of the fact that the defendant was not fully warned of his constitutional rights, was not afforded the rights of effective assistance of counsel, confrontation or cross-examination and was deprived of his privilege against self-incrimination. This motion further claimed that both by reason of the procedure followed, i.e., the manner of conducting the proceeding, the presence of Captain Bishop and the publication of the grand jury report naming the defendant as a participant in a crime, and by reason of the unconstitutionality of 54 Conn. Gen. Stat. § 47 itself, the defendant was deprived of the protections guaranteed by the 5th, 6th and 14th Amendments. This motion was denied on September 23, 1969. This denial was assigned as error. The Supreme Court upheld this ruling on the ground that the hearing was merely investigatory and that no prejudicial disclosure was shown. In this regard the court ignored the evidence in

the record filed in conjunction with the motion for change of venue, which revealed that the grand-jury report naming the defendant as a criminal participant was broadly circulated and editorialized in the local press. (Appendix, pp. 77a-79a, Decision, pp. 2b-3b).

In this same motion the defendant further asserted that the Connecticut Statutes, including 51 Conn. Gen. Stat. § 175, *supra*, which provides for the appointment of the Waterbury State's Attorney by the Judges of the Superior Court denied the defendant his right to have his cause determined in an adversary, accusatorial proceeding in accordance with the 14th Amendment's Due Process guarantee. This portion of the motion was also denied on September 23, 1969 and error was assigned as to its denial. The Supreme Court, likewise, considered and rejected this claim relying basically on the history of this procedure in Connecticut. (Appendix, p. 81a, Decision, pp. 5b-8b).

The defendant also moved prior to trial pursuant to Connecticut statute for the production of all exculpatory evidence in the State's possession. Upon the State's refusal to produce such evidence the defendant moved to dismiss. During the hearing on that motion the defendant argued that he was entitled to any evidence in the State's possession which was inconsistent with or contradictory to any evidence which the State intended to offer at the time of trial. The court concurred in this assertion but refused to review the State's file indicating that the State's Attorney would fulfill his duty in this regard. (Appendix, p. 65a).

Subsequent to the court's denial of this motion on November 25, 1969 the defendant received no exculpatory evidence from the State and trial commenced some two months later. At the commencement of that trial the State dropped the conspiracy count and filed a substituted com-

plaint charging the defendant with knowingly receiving and concealing a stolen Motorola television set having a value of more than $250 but less than $2,000 in violation of 53 Conn. Gen. Stat. §§ 63 and 65.

Trial commenced on January 15, 1970. The State's proof centered around the claim that during the year 1967 and proceeding into 1968 one John Bishop was engaged in stealing color television sets from various dealers throughout Connecticut and fencing them through one Charles Vernale, a Waterbury printer. The State further claimed that on April 8, 1967 Bishop broke into Martin's Appliance in North Haven, Connecticut and stole two sets, one being a 22" Motorola console in a maple early American cabinet. The State further claimed that John Bishop helped Charles Vernale deliver this set to the defendant in late April or early May of 1967 and that delivery was made by entering the rear of the house. This evidence was introduced through the testimony of John Bishop. In addition the State offered evidence to corroborate the presence of this set in the defendant's home through the testimony of one Edward Miller. The State had proven that a damaged TV chassis was found in the woods in a town outside of Waterbury on March 17 or 18, 1969. This chassis was shown to Miller who identified a sound coil repair on it and said that he had done this repair on a set in the defendant's home. The State offered testimony through Miller and others that the type of repair which involved removing the sound coil, soldering the filaments, taping them and resoldering the coil in place was a rare and unusual one and thus readily identifiable.

The defendant through his own testimony and that of others denied ever receiving any television set from Vernale. The defendant claimed that he had a used set in his home during 1967 upon which Edward Miller did a repair to the color portion, but that this was a mahogony Danish style

set. The defendant further testified that he had been a member of the Waterbury Police Department for 38 years and had risen from supernumerary to deputy chief. He stated that he had known Charles Vernale for many years and that Vernale had been a source of information over the years both to himself and to other officers. This point was also corroborated by several witnesses. Moynahan denied any knowledge of Vernale's involvement in stolen goods prior to mid-1968 when Vernale was arrested. Extensive testimony was offered through private citizens, public officials and police officers concerning Moynahan's reputation for truthfulness and honesty.

The focus of the State's case in proving receipt and possession was the testimony of John Bishop and Edward Miller.

After John Bishop completed his direct testimony the defense moved for all prior statements and grand-jury testimony of Bishop. Over the objection of the State, the trial court made an *in-camera* inspection and ordered all such documents to be produced. Upon review it was revealed that Bishop had given several sworn statements to the State Police and had testified twice before the grand jury. Further they revealed that prior to the discovery of the Motorola in the woods, every statement by Bishop was that the set he delivered was a make other than Motorola, that it had been stolen from a different place, in a different town, at a different time, that he had never seen Moynahan before June of 1967, that he had delivered the set in a different way and at a different time than he testified to. (Appendix, p. 65a). He further testified to a long criminal record, to the fact that he had 30 to 35 charges outstanding for breaking and entering and theft of televisions and that he was promised favorable consideration if he testified against this defendant. Finally he acknowledged that he first identified the set as being a Motorola coming

from Martin's after the State's Attorney told him about it, which occurred after the set was found in the woods and was identified as coming from Martin's.

Edward Miller then testified on direct that he had repaired a 22" Motorola early American console at the defendant's home in the summer of 1967 and then described in detail the repair.

Prior to cross-examination of Edward Miller the defendant also moved for all statements and testimony given by him to the grand jury. The trial court, however, refused to order this and left it to the State's Attorney to review these statements and to furnish any relevant exculpatory portions to the defense. The defendant excepted to this procedure and urged the court to make its own inspection, which it refused to do. The defendant assigned this as error and the Supreme Court ruled that the sole responsibility for production rested with the State's Attorneys and the trial court was not required to review their decision to determine compliance with their duty to produce exculpatory evidence (Appendix, p. 65a, Decision, pp. 26b-28b).

Thereafter upon review of the prior statements it appeared that prior to his being shown the set found in the woods, Miller had been unable to recall when he repaired the set, what repair he did, the make or model of the set, and in fact had stated that he would not in any event have any recall of what repair he did (Appendix, p. 67a).

The defendants commenced cross-examination of Miller; however, at the State's request the jury was excused. The parties then argued over whether the defense could cross-examine Miller about his involvement with John Bishop and Charles Vernale. The defense claimed that Miller was in fact a Motorola dealer in the firm of Miller & Fellin, Inc. during 1967 and 1968 and had testified that he derived his sole income from that company. However, it appeared from

the statements given that he had sold at least two television sets that he got from Charles Vernale to a Mr. Stevens and a Mr. Gaspari. Therefore, the defendant wished to cross-examine him to show that he was in fact selling sets for Vernale and knew that they were stolen. However, the court ruled that since Miller was not arrested he could not be examined with respect to his possible criminal involvement. The trial court further sustained the State's objection to questions asked in the jury's absence. The defendant took exception to this ruling and assigned it as a ground of appeal. (Appendix, pp. 9a-19a). The Supreme Court, however, erroneously ruled that the claim had been abandoned at the trial level (Decision, p. 24b).

Again in his defense of the case the defendant sought to introduce the testimony of Mr. Gaspari and Mr. Stevens as to their purchase of stolen sets from Edward Miller and to offer evidence to show that the payments to Miller never went into the accounts of Miller & Fellin and to show that Miller was in fact dealing in stolen sets and keeping the proceeds himself. All this was presented in an offer of proof and testimony in the jury's absence from Mr. Stevens. The trial court refused to admit the evidence. The evidence was preserved as an offer of proof, objections and exceptions were taken and the denial was assigned as error (Appendix, pp. 19a-29a). However, the Supreme Court refused to pass on it.

In like vein the trial court refused to allow the jury to hear testimony from Miller's partner, Daniel Fellin, as to the nature of Miller & Fellin's business, the fact of television sales during 1967, the absence of records of sales to Stevens or Gaspari, but permitted an offer of proof in the jury's absence. This ruling was also assigned as error (Appendix, p. 30a). However, the Supreme Court also refused to discuss this claim. In its argument to the jury the State focused on Miller as the "one honest man" in the

case, "the one whom you can believe" and stressed the lack of any motive or interest on his part (Appendix, p. 29a).

Subsequent to the testimony of both Miller and John Bishop the State called Charles Vernale. In the jury's absence the defense requested the court to inquire as to Vernale's intention to invoke the Fifth Amendment. At this time Vernale was in prison by reason of his plea of guilty to charges stemming from his purchase of television sets from John Bishop, and he had other criminal matters pending which arose out of these dealings. The defense informed the trial court that Vernale's attorney was in court and had advised Vernale to invoke the Fifth Amendment. The defense argued that to permit such invocation in the jury's presence would violate the defendant's 6th Amendment Right of Confrontation and 14th Amendment Due Process rights. The trial court ruled that the defense had no standing to make such a claim and that it would only agree to it, if the State agreed. The State, however, refused to agree to such a voir dire inquiry. Vernale was then put on the stand and in the jury's presence invoked the Fifth Amendment on three occasions, the third occasion being in response to the question whether he ever gave a color television set to the defendant. Thereafter in its argument to the jury the State urged them to recall that when Vernale was asked if he gave the defendant a television set he took the Fifth. The defendant objected to the court's ruling, took exception to it and assigned it as error. The Supreme Court, however, ruled that such an objection was not valid unless some intentional misconduct was shown on the prosecutor's part. No attempt was made by the Supreme Court to adopt any guidelines for the handling of such matters, apparently holding that voir dire inquiry would be limited to those cases where the prosecution actually knows in advance of an intended invocation. Further the Supreme Court did not consider the defense claim that the

State and the trial court had actual knowledge after Vernale invoked the Fifth Amendment the first time and therefore the continued questioning was clearly improper (Appendix, pp. 7a-9a, Decision, pp. 20b-23b).

After Vernale's examination the defense also moved for his prior statements. Again the trial court ruled that the sole determination of what should be given rested with the prosecutor and therefore no *in camera* inspection would be done by the court. The defense again excepted to this ruling and assigned it as error. This argument, however, was rejected by the Supreme Court for the previously stated reasons (Appendix, p. 75a, Decision, pp. 26b-28b).

Following receipt of the edited portions of Vernale's testimony the defense moved to dismiss or for a mistrial because of the withholding of obviously exculpatory testimony by the State including testimony of Vernale. The defense pointed out that such testimony had been ordered to be produced prior to trial, but had not. The defense also pointed out that the prior statements of Bishop and of Miller were clearly contradictory to their direct testimony and that the prior testimony of Vernale was clearly in conflict with testimony given by Bishop and by Miller. The defendant claimed that his due process rights had been violated since the withholding of the testimony after both a request and a court order and the giving of it piecemeal precluded any proper and meaningful preparation for trial. The defense also reiterated its request that the trial court make an *in camera* inspection. The court, however, denied both the request and the motions and exceptions were taken and error assigned. The Supreme Court dismissed this claim on the ground that no exculpatory evidence existed, apparently thereby concluding that inconsistent and contradictory testimony is not exculpatory (Appendix, pp. 48a-65a, Decision, p. 28b).

The State, in an effort to establish the crucial issue of actual knowledge that the set was stolen at the time of receipt, which is a requirement of proof in Connecticut, offered as its witness Captain Wayne Bishop of the Connecticut State Police. Captain Bishop testified that he had questioned the defendant on February 8, 1969. At that time the defendant was advised of his right to counsel and waived it. The questioning was recorded and a word-for-word verbatim transcript was prepared. This transcript was available at trial and was in the State's possession. The State asked Captain Bishop to testify as to his recollection of what the defendant said in that statement. The defendant objected on the ground that such a procedure was inherently unfair, violated the best evidence rule and also violated the defendant's right to counsel, since the waiver applied only to the actual statement. The court overruled that objection and an exception was taken to it. Thereafter Captain Bishop testified that he recalled the defendant saying that he knew John Bishop was stealing and that Vernale was receiving. On cross-examination Captain Bishop acknowledged that the document in the State's possession was a verbatim word-for-word recording of what was said and that in fact the defendant said in that statement that he didn't know Bishop was stealing and didn't know Vernale was receiving and that he first learned of their involvement in March of 1968 some 11 months after the supposed delivery of the set to him. Notwithstanding this the Supreme Court ruled that the best evidence was Captain Bishop's recollection of the contents of the statement rather than the statement itself. In fact the court itself accepted the testimony of Bishop and found that the defendant said in this statement that he knew these facts on April 5, 1967, which is completely erroneous as a review of that statement would show (Appendix, pp. 31a-41a, Decision, pp. 19b-20b).

During the course of its charge to the jury the trial court charged that while a defendant did not have to take the stand, once he did his testimony should be weighed in light of his interest in the outcome of the case. The defendant excepted to this charge on the grounds that it offended the presumption of innocence and denigrated the defendant's testimony to a level below that of all other witnesses. However, the Supreme Court upheld this charge on the ground of prior precedent (Appendix, pp. 41a-44a, Decision, p. 12b).

The jury returned a guilty verdict and the defendant was thereafter sentenced to a year and a day to three years in State's Prison and fined $500. John Bishop received a suspended sentence on the charge of breaking and entering Martin's Appliance and the charge of larceny of the set in issue and another set. The State dropped the charges on the other 30 to 35 breaks to which Bishop confessed as well as on the 100 or so larcenies which were committed during these breaks.

VI. Argument of Law

Question 1: The invocation of the Fifth Amendment by a prosecution witness in the jury's presence poses a basic Sixth Amendment issue. *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The Connecticut Supreme Court, however, ignores the significance of this right by limiting its consideration to the question of whether prosecutorial misconduct brought about such invocation.

The test of whether this right has been infringed should be based on whether the prosecution knew or should have known that the Fifth Amendment might be invoked. The affirmative duty thus rests on the prosecution to bring the possibility to the court's attention whenever it arises.

Vandegrift v. *State*, 237 Md. 305, 206 A.2d 250 (1965); *State* v. *Cullen*, 103 N.J. Super. 360, 247 A.2d 346, 347 (1968); *People* v. *Pollock*, 21 N.Y.2d 206, 234 N.E.2d 223 (1967); *Mathis* v. *State*, 469 S.W.2d 796, 800-1 (Tex. Cr. App. 1971). The duty then rests with the court to hold voir dire examination in the jury's absence in order to limit the witness's testimony. *State* v. *Guido*, 40 N.J. 191, 191 A.2d 45, 50 (1963); *Green* v. *State*, 243 Md. 154, 220 A.2d 544 (1966); *State* v. *Robertson*, 102 R.I. 623, 232 A.2d 781 (1967). And see *United States ex rel. Fournier* v. *Pinto*, 408 F.2d 539, 541 (3d Cir. 1969).

Even assuming that the prosecutor's duty is limited to actual rather than constructive notice, as the Connecticut Supreme Court suggests, the record in this case establishes that such actual notice existed. While the prosecution might plead ignorance before the first invocation it must be remembered that the witness here invoked the Fifth Amendment three times. Further, it was the third question that touched upon the basic issue. Where the invocation occurs under such circumstances it must be deemed to offend the Sixth Amendment. *DeGesualdo* v. *People*, 364 P.2d 374 (Colo. 1961); *State* v. *Dinsio*, 176 Ohio St. 460, 200 N.E.2d 467 (1964); *State* v. *Johnson*, 413 P.2d 383 (Or. 1966); *Fletcher* v. *United States*, 332 F.2d 724 (D.C. Cir. 1964); *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967); *United States* v. *Tucker*, 267 F.2d 212 (3d Cir. 1959); *San Fratello* v. *United States*, 340 F.2d 560 (5th Cir. 1965); *United States* v. *Compton*, 365 F.2d 1 (6th Cir. 1965); *Sanders* v. *United States*, 373 F.2d 735 (9th Cir. 1967).

The evil inherent in such an invocation rests with the possible inference which the jury may draw from it. *United States* v. *Maloney*, 262 F.2d 535, 537 (2d Cir. 1959). This evil is exacerbated when as here the prosecutor in fact urged the jury to draw such an inference (Appendix, p. 9a). *Terry* v. *Commonwealth*, 471 S.W.2d 730 (Ky.

1971); *People* v. *Mack*, 120 Ill. App.2d 149, 256 N.E.2d 501 (1970). Further, as this court has pointed out in prior decisions, the infringement of a Sixth Amendment right cannot be rectified by a jury charge. *Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). And see *United States* v. *Maloney, supra* at p. 538.

Question 2: The right of a defendant to full and thorough cross-examination of a prosecution witness is clearly protected by the Sixth Amendment. *Smith* v. *Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968). This includes the right to elicit evidence designed to establish that witness's interest or motive to testify for the State. *Id.* at pp. 131-3.

In this case the record presented by the defendant, notwithstanding the strictures imposed by the trial court, indicates that Edward Miller was more than the honest and disinterested witness which the prosecution portrayed in its jury argument (Appendix, pp. 29a-30a). By the evidence available to the court he was at all times involved here a television repairman and dealer in Motorola televisions working for Miller & Fellin, Inc. The State's own evidence indicated that a legitimate dealer could only obtain Motorolas from two distributors in Connecticut. Such sales are always accompanied by supporting documents such as invoices. Notwithstandng this Miller admitted buying two sets from Charles Vernale, a printer, and reselling them at retail prices. Further he claimed a third sale which he later admitted to have been a lie. He also repaired sets for friends of Vernale. While he testified that this income was solely derived from Miller & Fellin, Inc., the records of that business would disclose no record of sales of the stolen sets. Notwithstanding this foundation the trial court refused to permit inquiry as to whether invoices were obtained from Vernale or how much was paid Vernale for

the sets. Further it refused to allow the jury to hear any evidence concerning the manner in which Miller obtained or sold the sets, nor to hear any evidence concerning the fact that payments for such stolen sets were kept by Miller and never recorded in the books of Miller & Fellin, Inc.

The evidence also indicated that Miller was questioned repeatedly by the police before the television set was found in the woods. During all such questioning he indicated an inability to identify the set in the Moynahan home by make, model, size or repair. It was only after he saw the set which was found that his story of a complex and unique repair was obtained.

The defendant believes that Miller had the opportunity to repair such a set in many places other than the Moynahan home. Further he had a potential motive of self-protection in view of his probable involvement as a salesman and repairer of stolen sets. Such a motive is clearly a matter of legitimate cross-examination. And the fact that Miller was not arrested has no bearing on the right to develop such a motive or interest. *Hammock* v. *State*, 7 Ala. App. 112, 61 So. 471 (1913); *State* v. *Torres*, 97 Ariz. 364, 400 P.2d 843 (1965); *People* v. *Kuberacki*, 310 Mich. 162, 16 N.W.2d 703 (1944); *State* v. *Riley*, 49 N.J. Super. 570, 140 A.2d 543 (1958); *State* v. *Warner*, 79 Utah 510, 13 P.2d 317 (1932); *Spaeth* v. *United States*, 232 F.2d 776 (6th Cir. 1956); *United States* v. *Lester*, 248 F.2d 329 (2d Cir. 1957).

The denial of an opportunity to conduct this type of cross-examination has been held on numerous occasions to constitute an infringement of the basic right of cross-examination and thus to render the defendant's trial inherently unfair. *State* v. *Little*, 87 Ariz. 295, 350 P.2d 756 (1960); *State* v. *Madden*, 161 Minn. 132; 201 N.W. 297 (1924); *State* v. *Cerenzia*, 134 Wash. 500, 236 Pac. 80 (1925); *State* v. *Willey*, 97 W.Va. 253, 125 S.E. 83 (1924);

United States v. *Greenberg*, 423 F.2d 1106 (5th Cir. 1970); *Grant* v. *United States*, 368 F.2d 658 (5th Cir. 1966); *United States* v. *Dickens*, 417 F.2d 958 (8th Cir. 1969).

Question 3: In Connecticut in order to establish guilt for the crime of receiving stolen goods it is necessary to prove that the recipient had actual knowledge that the goods were stolen at the time of their receipt, which in this case would be actual knowledge as of April, 1967. *State* v. *Fredericks*, 149 Conn. 121, 176 A.2d 581 (1961); *State* v. *Pambianchi*, 139 Conn. 543, 95 A.2d 695 (1953); *State* v. *Newman*, 127 Conn. 398, 17 A.2d 774 (1940). In this case the State's sole reliance for proof of such knowledge came from the testimony of Captain Wayne Bishop as to what he recalled the defendant saying in an interview on February 8, 1969. That interview was recorded, typed up and was conceded by the State and by Captain Bishop himself to be a complete verbatim and word-for-word transcription of everything the defendant said. Further, Captain Bishop conceded on cross-examination that the testimony he gave on direct was not contained in that statement. Thus it seemed inconsistent with sound judicial reasoning that the Connecticut Supreme Court ruled that a witness's inaccurate recollection of the contents of an accurate document will be given probative value in proving a crucial element of a crime beyond any reasonable doubt. It is for this very reason that the court in *Gray* v. *State*, 181 Md. 439, 30 A.2d 744, 746-7 (1943) held that such a procedure offended due process and was repugnant to the best-evidence rule.

The approach of the Connecticut Supreme Court likewise runs counter to the theory of conscious waiver of one's protected constitutional rights, and in particular the right to counsel. Thus if a person is advised of his right to counsel prior to interrogation and waives that right, his waiver is limited to those questions actually asked and those

answers actually given. Such waiver carries with it a consent that those questions and those answers may be used in subsequent proceedings against him. However, the ruling of the Connecticut Supreme Court seems to be that if one waives his right to counsel and submits to police interrogation he thereby agrees to the use in court, without the benefit of any further claim of constitutional protection, of statements he never made. Such a concept seems repugnant to prior definitions of waiver as applied by this court. *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 57 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Brookhart* v. *Janis,* 384 U.S. 1, 2-3, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

Question 4: By according sanctity to a charge which violates the basic presumption of innocence the Connecticut court has run counter to historical concepts of due process as expressed by this court and to numerous decisions from other states. In a lengthy analysis of the inherent unfairness of this charge the Iowa Supreme Court in *State* v. *Bester,* 167 N.W.2d 705 (Iowa 1969) held that it destroyed the presumption of innocence and stripped the defendant's testimony of its just weight. The court noted that this view was consonant with decisional law in Arizona, California, Idaho, Kentucky, Louisiana, Mississippi, Missouri Nevada, Oklahoma, South Carolina and Texas. A like result was reached in Indiana in *Garvin* v. *State,* 263 N.E.2d 371, 372 (Ind. 1970).

However, the Connecticut decision is even more questionable in that it runs counter to a long series of precedents of this court. Thus in two decisions separated by a span of 66 years this court has reaffirmed that the presumption of innocence is an undoubted part of our law, lying at the very foundation of criminal procedure. *Coffin* v. *United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895); *Deutch* v. *United States,* 367 U.S. 456, 471, 81 S.Ct. 1587, 6 L.Ed.2d 963 (1961).

In applying this doctrine to charges such as this, this court as early as *Hicks* v. *United States*, 150 U.S. 442, 451-2, 14 S.Ct. 144, 37 L.Ed. 1137 (1893) perceived the inherent inconsistency of one to the other. In like vein this court in *Allison* v. *United States*, 160 U.S. 203, 207, 16 S.Ct. 252, 40 L.Ed. 395 (1895) followed *Hicks* and ruled that the testimony of the defendant cannot be denigrated by charges designed to strip it of its competency. Again in *Wilson* v. *United States*, 162 U.S. 613, 621, 16 S.Ct. 895, 40 L.Ed. 1090 (1896) this court considered and reaffirmed the principles in *Hicks* and *Allison*. Finally in *Quercia* v. *United States*, 289 U.S. 466, 471, 53 S.Ct. 698, 77 L.Ed. 1321 (1933) this court again renounced any practice whereby the testimony of the defendant is diminished.

Thus to suggest that the presumably innocent defendant's testimony is to be downgraded because of his obvious desire to secure his innocence is at minimum inconsistent with the presumption of innocence and is at most the actual substitution of a presumption of guilt.

Question 5: The Supreme Court of Connecticut in considering the defendant's claim that the State failed to produce exculpatory evidence prior to trial in response to the defendant's request and the court's order and failed to produce such evidence either before or during trial except in a piecemeal fashion which deprived the defendant of its effective use in countering the State's testimony, merely concluded that it could not find that such evidence existed. This conclusion can only be justified if one also concludes that evidence in the prosecution's possession which is inconsistent with or contradictory to other evidence which the prosecutor intends to offer is not exculpatory.

It is apparent, however, that this *sub silentio* opinion runs counter to several precedents in point. Thus it has been held that evidence which is inconsistent with or con-

tradictory to other evidence is exculpatory. *Miller* v. *Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966) And evidence affecting the credibility of prosecution witnesses has also been deemed to be exculpatory. *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959). In this regard it has been specifically noted that evidence bearing on a witness's bias, interest or motive is exculpatory. *Commonwealth* v. *Kurtz*, 219 Pa. Super. 1, 280 A.2d 410 (1971).

Since the Connecticut court refused to recognize the existence of exculpatory evidence it therefore failed to consider either the duty to produce or the time when such production must be undertaken.

The duty to produce is grounded in the fairness doctrine of the due process clause. *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Therefore, the failure to produce is itself a violation and consequently the reason for non-production need not be considered. In other words the motive of the prosecutor is irrelevant. *Ibid; Hanson* v. *Cupp;* 484 P.2d 847, 850 (Or. 1971); *Ex parte Cherry*, 456 S.W.2d 949, 952 (Tex. Cr. App. 1970).

While the duty to produce rests in the first instance with the prosecutor, the trial court also has an affirmative role and responsibility. Once non-compliance has been brought to the court's attention it has a duty to make an inquiry. *Richardson* v. *State*, 246 So.2d 771, 775 (Fla. 1971). If the State claims a right to refuse compliance it has the burden to prove it. *Ibid.* The court in turn has a responsibility to make an *in camera* inspection. *People* v. *Wimberly*, 384 Mich. 62, 179 N.W.2d 623, 626 (1970). At no time, however, should the burden be on the defendant to

establish what it is that he has not been permitted to see. *United States* v. *Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971).

The time for compliance is likewise crucial. If there has been a refusal to comply with a pretrial order a mistrial is required. *State* v. *Hiteshew*, 476 P.2d 935, 936 (Or. 1970). Where the production has been given at a time and in a manner sufficient to permit adequate review and preparation for trial a reversal is mandated. *Richardson* v. *State*, *supra* at p. 775; *People* v. *White*, 123 Ill. App. 2d 102, 259 N.E.2d 357 (1970). Clearly the giving of documents when it is too late to use them for cross-examination is not compliance. *People* v. *Green*, 272 N.E.2d 721, 724 (Ill. App. 1971).

In this case it is apparent that the State had statements which directly contradicted John Bishop. These included not only his own statements but those of Vernale as well. In like manner Edward Miller's pretrial statements were inconsistent with and contradictory to his in-court testimony. Similarly, statements of Vernale contradicted Miller (Appendix, pp.). Finally it was consistently submitted that the State had evidence bearing on Miller's actual criminal involvement. However, to date no judge has indicated the slightest willingness to inquire into this matter.

Such a procedure strips the defendant of any opportunity to be afforded that basic protection which the Fourteenth Amendment mandates.

Question 6: Tracking Question 5 is the holding of the Connecticut Supreme Court that since it has never required a judge to make an *in camera* inspection to test compliance it apparently never intends to do so. This is a rather unique application of *stare decisis* since it holds that historical non-action is a sufficient basis for con-

tinued non-action regardless of any decisions of this court or of other courts which indicate that action may be mandated. The action referred to in this instance is the affirmative duty of a court to see that a defendant's due process rights are protected, which basic duty, in the case of prosecutorial non-compliance, encompasses the underlying duty to require the State to present evidence of the reasons for that non-compliance and its own duty to make an *in camera* inspection to establish that non-compliance is justified. *Richardson* v. *State, supra; People* v. *Wimberly, supra; United States* v. *Bryant, supra.*

Consistent with these duties it has been held that the court's responsibility to make an *in camera* only arises when the State has offered evidence of actual reasons for non-compliance. If no valid reason for non-compliance is asserted or found then all documents must be turned over to the defense and the court need not examine them. Conversely if a valid reason for non-compliance is given then the *in camera* inspection is mandated in order to determine whether that reason is sufficient to overcome the basic requirement of disclosure, which judgment can only be made if one has knowledge of the contents of the records and can thus assess their potential benefit to the accused. Therefore to refuse to make such an inspection is an abuse of discretion. *United States* v. *Barson,* 434 F.2d 127, 130 (5th Cir. 1970).

Connecticut, however, has adopted a totally different rule, which rule leaves the sole determination of whether compliance will occur to the prosecutor, and insulates that decision from judicial review by a flat refusal to make any inquiry as to its reasons. This runs directly counter to numerous precedents in this area. *Dennis* v. *United States,* 384 U.S. 855, 873-4, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); *United States* v. *McGowan,* 423 F.2d 413, 418 (4th Cir. 1970); *People* v. *Allen,* 47 Ill. 2d 57, 264 N.E.2d 184, 186

(1970); *People* v. *Wimberly, supra; Richardson* v. *State, supra; People* v. *Marra*, 27 Mich. App. 1, 183 N.W.2d 418, 420 (1970); *United States* v. *Barson, supra.* And its effect is to return criminal procedure to a game of hide-and-seek. *Stevenson* v. *State*, 486 P.2d 646, 650 (Okla. Cr. App. 1971).

Question 7: The so-called one-man grand jury as it exists in Connecticut presents unique problems of due process. Under this procedure a person may be summoned to testify before a judge and may be interrogated by a State's Attorney. Further, under the holding in this case the investigating police officers may be present to counsel and assist in the interrogation. Nonetheless the witness may not have counsel present. Further this hearing may, as it did in this case, result in the public circulation in the press of the conclusions of this judge as to the criminal involvement of the person. Yet notwithstanding this pre-arrest determination of guilt he is not entitled to be told the nature of the investigation, to hear the testimony against him, to cross-examine witnesses or to present evidence in his own favor. Further the police officer in attendance at the hearings may then utilize the information obtained in order to effect the person's arrest and may later testify as to his recollection of that testimony.

The constitutional deficiencies of this proceeding are several fold. First, while it is in effect a vehicle to permit police interrogations of suspects, no effective assistance of counsel is permitted. Second, while it results in findings of criminal involvement it affords no opportunity for confrontation or defense. Third, it lacks the protection of secrecy afforded traditional grand-jury matters and in fact permits the results to be published as a public condemnation prior to giving the person any opportunity to assert his innocence.

One need not apply much imagination to realize the devastating and unfair effect of such a proceeding on a

man, such as the defendant, who was held in high esteem in his community, and who had spent 38 years in public service as a police officer. Further notwithstanding the court's rejection of the motion for change of venue, one need only look at the newspaper articles filed as exhibits to see how inflammatory and prejudicial such publication is on the person's opportunity to obtain an impartial jury.

Such a proceeding it is submitted sharply conflicts with settled principles of due process.

The presence of police officers or other persons in grand jury proceedings has been condemned and has been held to render such proceedings void in *People* v. *Minet,* 296 N.Y. 315, 73 N.E.2d 529 (1947). And see *United States* v. *Edgerton,* 80 F. 374, 375 (D. Mont. 1897). Similarly, in holding that a bill permitting police officers to be present at such hearings was unconstitutional the Massachusetts Supreme Judicial Court pointed out that their presence affords an opportunity for subjecting witnesses to fear or intimidation, for preventing freedom of full disclosure and for infringing the secrecy of the proceedings. *Opinion of the Justices,* 232 Mass. 601, 123 N.E 100, 101 (1919).

The proceeding itself seems clearly to conflict with the accused's right to counsel. At the time of this hearing it was apparent to the State that the defendant was under investigation since he had been interrogated over a month before (on February 8, 1969). Under these circumstances his rights under *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) had attached. *State* v. *Sarcone,* 96 N.J. Super. 501, 233 A.2d 406, 410-11 (1967); *People* v. *Laino,* 10 N.Y.2d 161, 176 N.E.2d 571, 577 (1961).

Further the fact that this proceeding resulted in a public conclusion of criminal involvement requires that due process standards be met. *Jenkins* v. *McKeithen,* 395 U.S.

411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969); *In Re Oliver*, 333 U.S. 257, 278, 68 S.Ct. 499, 92 L.Ed. 682 (1948). This includes the right of confrontation and cross-examination. *ibid.* It also includes the right to counsel. *State* v. *Sarcone, supra*, 233 A.2d at 411; *People* v. *Laino, supra*, 176 N.E.2d at 577. Where such rights are not granted the remedy of dismissal is mandated. *Ibid.* This should be particularly true where as here the proceedings resulted in a public branding by State officials, since the secrecy which gives dignity to the traditional grand jury has been ignored. *United States* v. *Smyth*, 104 F. Supp. 283, 288 (N.D. Cal. S.D. 1952); *Hale* v. *Henkel*, 201 U.S. 43, 59, 26 S.Ct. 370, 50 L.Ed. 652 (1906). And see *United States* v. *Aquco*, 310 F.2d 817, 832 (2d Cir. 1962).

Many years ago Justice Cardozo condemned this one-man grand jury system as an inquisition where the judge ceases to perform a judicial role and becomes both judge and prosecutor. *In Re Richardson*, 247 N.Y. 401, 160 N.E. 655, 656, 658-9 (1928). It would seem appropriate that this court now do the same.

Question 8: Connecticut stands alone as the only state in the nation wherein the judges appoint the prosecutors. Nedrud, *The Career Prosecutor*, 51 J. Crim. L. & P.S. 343, 344 (1960).

This procedure, it is submitted, conflicts with one of the basic tenets of the accusatorial system, i.e., the total separation of the judicial and prosecutorial functions. That accusatorial system is a part of our societal fabric and is thus enforceable against the states. *Malloy* v. *Hogan*, 378 U.S. 1, 19, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). It was for this reason that Professor Nedrud pointed out that the separation of functions is vital to the process of criminal justice, and that therefore the judge should have no right to choose the prosecutor any more than the prosecutor

should have the right to choose the judge. Nedrud, *The Career Prosecutor,* 52 J. Crim. L. & P.S. 104 (1960). And Judge Learned Hand noted in *United States* v. *Marzano,* 149 F.2d 923, 926 (2d Cir. 1945) that the two functions are quite separate in the administration of justice and must not therefore be merged.

The rejection of this system in every other jurisdiction should suggest its shortcomings. However, more basically the precedents cited should require an examination of this procedure in order to assess whether it is consonant with basic due process principles.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

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APPENDIX

Appendix (Opinion and Judgment of Supreme Court of Connecticut as Amended)

SUPREME COURT

January Term, 1973

Docket No. 7032

STATE OF CONNECTICUT v. PAUL MOYNAHAN

Information charging the defendant with the crime of receiving stolen goods, brought to the Superior Court in New Haven County at Waterbury and tried to the jury before Zarrilli, *J.*; verdict and judgment of guilty and appeal by the defendant. No error.

Edward F. Hennessey, with whom was James A. Wade, for the appellant (defendant).

Dennis F. Gaffney, special assistant state's attorney, for the appellee (state).

Loiselle, *J.* The defendant was found guilty by a jury of the crime of receiving stolen goods in violation of General Statutes § 53-65. He has appealed from the judgment rendered on the verdict, assigning thirty-two errors. All of the claimed errors have been considered but no useful purpose would be served by a lengthy discussion of each assignment of error. Many of the issues raised by the defendant have been previously determined by this court and are well established by precedent in our law. Only those issues, therefore, which merit comment are discussed.

The defendant in his assignment of errors attacks the court's (Barber, *J.*) denial of his motion to quash, his

motion for change of venue and his motion to dismiss on the ground that the state's attorney is appointed by the judges of the Superior Court and, hence, unconstitutionally appointed. The defendant further claims that the inquiry under General Statutes § 54-47 was unconstitutional; that the warrant was issued without probable cause, and that the court erred in its denial of the defendant's motion to dismiss based on a claim that the state's attorney did not provide exculpatory information as ordered by the court. All of these motions were made before trial.

I

The motion to quash alleged that Wayne Bishop, a captain in the state police, was present at an investigatory inquiry held under § 54-47[1] on May 6, 1969, and the finding and both appendices reveal that Captain Bishop was in fact present. The motion alleged that Captain Bishop's presence was illegal and that he "further participated illegally in said hearings as he acted as an attorney propounding questions to the witnesses." There is nothing in the record or the appendices to substantiate this latter claim. In fact, Captain Bishop's testimony narrated in the state's appendix to its brief is to the contrary.

While the record is devoid of an order for an inquiry under § 54-47, it is evident that an inquiry was in fact conducted by former Chief Justice O'Sullivan, a state referee, and that evidence taken at that inquiry was used against the accused by the state through the testimony of Captain Bishop. The defendant limits his argument in his brief to the claim that the presence of Captain Bishop at the investigatory inquiry was a violation of § 54-47.

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[1] Although described in the vernacular as a "one man grand jury," the correct designation for a proceeding under § 54-47 is "investigatory inquiry."

General Statutes § 54-47, enacted in 1941, provides for a one-man investigation significantly different from the constitutional grand jury empowered to indict under General Statutes § 54-45. Since *Lung's Case*, 1 Conn. 428, the proceedings under § 54-45 have been uniform by rule of court. It is clear that § 54-47 affords a greater informality and a more broadly based scope of inquiry than that of a constitutional grand jury with power of indictment. The investigatory inquiry can be private or public, witnesses may be questioned by the judge, the referee, the state's attorney, the assistant state's attorney or any other attorney appointed for that purpose and the report made to the Superior Court by the judge or the referee may be made public. Anyone accused of a crime as a result of such inquiry is guaranteed access to the transcript of his own testimony. Furthermore, there is no restriction placed by statute on the presence of any person at the inquiry. The modern investigatory inquiry authorized by § 54-47 has functions similar to the general investigatory grand jury known to common law which could inquire into crimes. *State* v. *Menillo*, 159 Conn. 264, 273, 268 A.2d 667. There remains, however, one essential difference which distinguishes the investigatory inquiry from the common-law investigatory grand jury. Under § 54-47 the judge or referee who conducts the inquiry has no power or authority to issue an indictment. His sole function is to investigate and report his findings to the court. The court has the option of making the information garnered by the inquiry available to the state's attorney but this decision under § 54-47 rests with the court, not the investigating officer. The latitude afforded the judge or referee under the statute is designed to ensure that the proceeding is conducted in an orderly and expeditious manner. To that end, it was proper for the referee conducting the investigation to utilize whatever assistance he deemed necessary, including the presence of the officer who originally was charged with the investigation prior to a court-ordered inquiry.

The final motion to dismiss submitted prior to trial is divided into three parts, of which only two are briefed. Our discussion is limited to those portions of the motion which were briefed. The motion to dismiss attacks § 54-47 as unconstitutional on its face because of a lack of minimum standards of due process. The defendant's principal claims are that the report can be made public, that counsel are precluded from attendance, and the right of confrontation and of cross-examination is denied a witness. The defendant relies principally on *Jenkins* v. *McKeithen,* 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404. That case, however, is inapposite to the present matter. The Supreme Court in *Jenkins* v. *McKeithen,* supra, 431, found that the function of the commission under attack was "to make specific findings of guilt, not merely to investigate and recommend." It specially held that "the commission exercised a function very much akin to making an official adjudication of criminal culpability." The Supreme Court in the *Jenkins* case reaffirmed *Hannah* v. *Larche,* 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307. The *Hannah* case, supra, 441-42, had held that in a purely investigatory inquiry by a body appointed or created for that purpose alone the rights of apprisal, confrontation, or cross-examination of witnesses were not constitutionally required by the due process clause. The inquiry under § 54-47 is made by an independent judicial officer and is investigatory and nonadjudicative. An inquiry is conducted and a report is made to the court. The inquiry has no other purpose or function and therefore does not violate the defendant's due process rights. *Salvaggio* v. *Cotter,* 324 F. Supp. 681 (D. Conn.), affirmed, 447 F.2d 1406; see also *Puglia* v. *Cotter,* 333 F. Supp. 940 (D. Conn.), cert. denied, 405 U.S. 1073, 92 S. Ct. 492, 31 L. Ed. 2d 806, affirmed, 450 F.2d 1362. The further claim that the inquiry is a critical stage of a proceeding requiring the presence of counsel under the *Miranda* rule is without merit. The inquiry is

investigatory and cannot be described as custodial where "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

The investigation in this case was conducted in private. The defendant's claims of prejudicial disclosure are merely conjectural; see *Jenkins* v. *McKeithen*, supra, 427; and adequate remedies were available to provide timely safeguards against publication of the findings. *Kennedy* v. *Justice of District Court*, 356 Mass. 367, 252 N.E.2d 201. Furthermore, it is clear that this investigation was not an accusatorial or adjudicative process but was simply investigatory in design and operation. Section 54-47 did not deny the defendant due process guarantees and is not an unconstitutional exercise of legislative authority. Diligent inquiry to ferret out crime will not be frustrated or denied so long as due process safeguards are available to protect the rights of the parties affected.

The remaining part of the motion to dismiss attacks the appointment of the state's attorney by the Superior Court judges as a denial of due process guaranteed by both the federal and state constitutions. The basis of the defendant's argument is that the state's attorney exercises an executive function in prosecuting crimes and cannot constitutionally be appointed by the judicial department. Alternatively, the defendant contends that the exercise of this appointment power, if constitutionally valid, nevertheless violates principals of due process by interjecting the judiciary unnecessarily into the accusatorial system.

General Statutes § 51-175 directs that the appointment of the state's attorney be made by the judges of the Superior Court.

Under the constitution of the state of Connecticut, appointments, other than those whose mode is prescribed, are governed by the division of governmental powers. *State* v. *Stoddard,* 126 Conn. 623, 627, 13 A.2d 586; *Norwalk Street Ry. Co.'s Appeal,* 69 Conn. 576, 586, 37 A. 1080. "Our own Constitution like most constitutions, provides for certain elective and legislative appointments; but except in the cases specified, appointment to office is an exercise of executive power, unless used as a means appropriate to the exercise of power granted to another department; and when so used it is not the exercise of executive power within the meaning of the Constitution." *Norwalk Street Ry. Co.'s Appeal,* supra, 595.

In determining whether the appointment of a state's attorney by the judges of the Superior Court is a means appropriate to the exercise of the judicial power, a controlling consideration is the functional consistency of such an appointment with the duties and powers of the judicial department as distinct from that of the executive department.

The functions of a state's attorney are not purely those of an executive officer. As a representative of the people of the state, he is under a duty not solely to obtain convictions but, more importantly, (1) to determine that there is reasonable ground to proceed with a criminal charge; *State* v. *Hayes,* 127 Conn. 543, 581, 18 A.2d 895; (2) to see that impartial justice is done the guilty as well as the innocent; and (3) to ensure that all evidence tending to aid in the ascertaining of the truth be laid before the court, whether it be consistent with the contention of the prosecution that the accused is guilty. *State* v. *Harris,* 147 Conn. 589, 598, 164 A.2d 399; *State* v. *Zimnaruk,* 128 Conn. 124, 127, 20 A.2d 613.

The state's attorney, thus, is an officer charged with important duties and responsibilities in the administraton of justice. Such duties of a state's attorney are entirely consistent with judicial power as prescribed by our constitution. *State* v. *Hayes, supra.*

This court in *Hopson's Appeal*, 65 Conn. 140, 146, 31 A. 531, held that when a function lies on the borderline of the division between executive and judicial power, the exercise of that power by the judiciary may be constitutionally valid and the practical construction of this exercise of power, both before and after the adoption of the constitution, may be safely accepted. The history of the statute authorizing judicial appointment of the state's attorney demonstrates a longstanding commitment to this practice.

Beginning in 1704 the assembly directed that the queen's attorneys (now the state's attorneys) be appointed by the county courts. "[T]he neglect of putting good lawes in execution against imoral offenders, that therefore such neglect may be prevented for the future: It is ordered and enacted by this Court [Assembly] that henceforth there shall be in every countie a sober, discreet and religious person appointed by the Countie Courts to be Atturney for the Queen, to prosecute and implead in the lawe all criminall offenders, and to doe all other things necessary or convenient as an atturney to suppress vice and imorallitie." See 4 Col. Rec. 468. In 1730 this appointment procedure was continued. 7 Col. Rec. 280.

The revision of 1808, the last revision of the statute laws of the state of Connecticut prior to the adoption of our state constitution in 1818, directed that state's attorneys be appointed by the respective county courts. Statutes, 1808, p. 67, § 6. While the constitution was silent with regard to this issue, the first revision of the statute laws of the state of Connecticut in 1821 [3] subsequent to the adoption of

[3] The special committee appointed by the legislature to examine statute laws following the adoption of the constitution in 1818 reported in part as follows: "The difficulty of diffusing a general knowledge of a voluminous code, and the perplexity and confusion arising from an intermixture of laws in force and not in force, have induced the committee to omit all statutes, and parts of statutes, which have been directly repealed, or superseded by new provisions, or become obsolete by the change of manners and customs, or inconsistent with the sentiments of the age, or repugnant to the principles and spirit of the constitution." Statutes, 1821, p. viii.

our state constitution in 1818, also directed that state's attorneys be appointed by the respective county courts. Statutes, 1821, p. 141, § 22; see also 2 Swift, Digest, p. 369 (1823).

The practice of judicial appointment of state's attorneys has prevailed to the present time without interruption and, until recently, without disputation. The delegation of this appointment power to the courts since 1704 is, in accordance with the rule of *Hopson's Appeal, supra,* constitutionally valid and the appointment of state's attorneys by the judicial department is appropriate within the scope of the judicial power confided to the courts by the constitution. Exercise of that power is incident to legitimate judicial functions. The constitutionality of this grant of power was clearly recognized by this court in *Adams* v. *Rubinow,* 157 Conn. 150, 163 n., 251 A.2d 49, and is no longer open to question.

The claim that the appointment of the state's attorney by the judiciary is foreign to the accusatorial system may be valid in some jurisdictions but in this state the system of judicial appointment of the state's attorney has functioned effectively for nearly 270 years with no prejudice to those accused of criminal offenses. The appointment of state's attorneys by the judiciary does not violate the defendant's due process rights guaranteed by the state and federal constitutions nor does it in any way diminish the salutary benefits of our accusatorial system.

The assignment of error directed to the court's denial of the motion for a change of venue is unsupported in the record or in the appendices to the briefs by any evidence of publicity likely to cause prejudice against the accused and consequently is not discussed.

The second motion to dismiss filed in November, 1969, alleged that the state's attorney did not provide defense counsel with all exculpatory material as previously ordered

by the court. An examination of the record fails to disclose any merit to this claim. Similar motions made during the trial are discussed elsewhere in this opinion.

II

The defendant's claims of error relating to the court's charge are tested by the claims of proof in the finding. *Robinson* v. *Faulkner*, 163 Conn. (34 Conn. L.J., No. 4, pp. 12, 13); *Busko* v. *DeFilippo*, 162 Conn. 462, 464, 294 A.2d 510. The state made the following claims of proof: On April 6 or 7, 1967, John Bishop broke into the Martin Appliance Company store in the town of North Haven and stole two television sets, one of which was a twenty-two-inch Motorola maple console color TV valued at $527.90 wholesale and $639 retail. Bishop then transported these sets to the home of Charles Vernale, who paid Bishop $200 for each set. Late in April, or early in May, 1967, Bishop went to Vernale's home to collect payment for other TV sets he had delivered to Vernale. On that occasion, he and Vernale loaded the stolen Motorola set into Vernale's station wagon and then drove to the defendant's home. Bishop and Vernale carried the set into the defendant's living room and left it there. The defendant was present at the time. The defendant was a regular visitor at Vernale's home. On one occasion in 1966, the defendant saw Bishop at Vernale's house and told Bishop: "I don't care what business dealings you and Charles have between you. That is your business, but if you ever do anything in Waterbury, I will have to nail you for it."

Edward Miller, a Waterbury television repairman, was called by the defendant to repair a color TV set on a Sunday in June, 1967. Miller repaired the set and was paid $15. In February, 1969, Miller told the state police that he had repaired a Motorola twenty-three-inch color television set, early American colonial, maple finish, for the defendant and that the repair consisted of soldering a wire

within the sound coil, wrapping it with black tape and then replacing the sound coil in a metal shield which would render the repair not visible without opening the metal shield. On March 27, 1969, a television set was found in the town of Terryville, about six and one-eighth miles from the defendant's home. Although the set had been smashed, the serial number identified the set as the one stolen from the Martin Appliance Company. Miller was shown the set on April 1 and 2, 1969. He informed the state police that if they opened the metal shield over the coil they would find the black plastic tape he had used, which was not visible from the outside. On April 3, 1969, the state police examined the set and found that when the metal shield on the sound coil wire was removed, the sound coil did have black tape on it and had been soldered.

On February 9, 1969, the defendant was interviewed by the state's attorney and Captain Wayne Bishop of the state police (hereinafter referred to as Captain Bishop to distinguish him from John Bishop who is referred to as Bishop). The defendant was advised that the questioning concerned Vernale and possible receipt of stolen goods by the defendant from Vernale. At this interview the defendant was advised of his rights and he waived his right to counsel and stated that in April, 1967, he knew that Vernale was receiving stolen goods; that Bishop was involved in breaking and entering and bringing goods to Vernale; that he would never take anything from Vernale because of his record, activities and reputation as a receiver of stolen goods; that he never had a color TV set before December, 1968; and that he probably should have warned his son about taking an air conditioner from Vernale.

On May 6, 1969, at the investigatory inquiry held by State Referee O'Sullivan with Captain Bishop present, the defendant stated he had had a twenty-three-inch color Motorola TV set previous to December, 1968, which had been given to him by Tony Caggiano, who was then de-

ceased. The defendant further testified that he had met a television repairman at Vernale's home and that the repairman had repaired his set; that he knew that both Vernale and Bishop had criminal records; that he knew three stolen television sets were removed from Vernale's home in 1965; that he knew Vernale was receiving stolen goods from breaks occurring in places other than Waterbury and that Vernale was to call him if any of the merchandise was brought to Vernale; and that he was friendly with Vernale.

The defendant offered evidence to attack the credibility of John Bishop, who was then awaiting sentence for breaking and entering on about thirty to thirty-five outstanding warrants. He offered evidence attacking the credibility of Miller. This evidence involved inconsistent statements made by Miller at different times and Miller's sale of two sets received from Vernale and the fact that the television set repairs were made by Miller for Vernale. The defendant testified that in his statement to Captain Bishop and the state's attorney he had denied receiving a television set from Vernale or knowing that Vernale was receiving stolen goods until sometime in 1968. The defendant also testified that he stated in the interview that Vernale was his informant from 1959 to 1968. The defendant offered evidence regarding his statement before the investigatory inquiry on May 6, 1969. He stated he had received a color TV set from Tony Caggiano in 1967 which was mahogany and not maple, and that it had been repaired by a man he had met at Vernale's home. He also stated that he was a subordinate of Detective Byrnes when some TV sets were found by them at Vernale's. The defendant introduced various witnesses who testified both as to his general reputation in the community for truth and veracity and for honesty and as to their own personal opinion as to his character traits. The facts claimed to have been proven by both the state and the defendant are more extensive than that presented but the recital above is sufficient to test the portions of the court's charge which the defendant claims were erroneous.

The defendant has briefed seven assignments of error directed to the charge of the court. The claim that the court erred in its charge that in weighing a witness' testimony the jury should consider the witness' interest, including the defendant's interest in the verdict, is without merit since the instruction was in accordance with our procedure and was proper. *State* v. *Guthridge,* 164 Conn. (34 Conn. L.J., No. 26, pp. 1, 3).

The court, in its charge, referred to the fact that Frank Maiola admitted that he gave false testimony with respect to a question asked of him by the state. The court cautioned the jury about considering the remainder of his testimony but told them the acceptance of his testimony or any part of it was for them to determine. It then stated: "This rule must be applied by you not only to the testimony of Frank Maiola, but also to the testimony given by any other witness who has appeared in court, including, of course, the testimony given by the defendant, Paul Moynahan, himself." The defendant excepted to this portion of the charge claiming the court picked out Maiola and the defendant by name and did not name three other witnesses who the defendant claimed gave contradictory statements. Maiola admitted that he consciously told an untruth under oath while testifying. No other such concession on the part of any witness has been established by either party. The charge was a guarded instruction on the maxim, falsus in uno, falsus in omnibus. *Willametz* v. *Guida-Seibert Dairy Co.,* 157 Conn. 295, 301, 254 A.2d 473; *Craney* v. *Donovan,* 92 Conn. 236, 246, 102 A. 640. Under such circumstances it was proper for the court to comment on this evidence. *State* v. *Cari,* 163 Conn. 174, 182, A.2d ; *State* v. *Tropiano,* 158 Conn. 412, 428, 262 A.2d 147, *cert. denied,* 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288; *State* v. *LaFountain,* 140 Conn. 613, 620, 103 A.2d 139. The inclusion of all other witnesses, including the defendant, by name to be affected by this rule was simply a caution to the jury that the rule applied to all witnesses who testified and did not place

undue emphasis on the defendant's testimony by noting that the rule also applied to the defendant.

In the charge, the court commented on the state's claim that the defendant had made inconsistent statements. The court noted that the state had asserted that, under oath during the investigatory inquiry, the defendant had stated that he never had a color TV set in his home and during the trial he made a contradictory statement. The court charged that a contradictory statement made by a party could be used not only to attack his credibility but also as an admission. The court carefully stated that if such statement was not made, the rule would be inapplicable and further stated in effect that even if the jury believed the statement was made they could conclude he never in fact had a color TV set or that one had been given to him by another. The defendant does not seem to attack the correctness of the court's statement but claims comment on that particular piece of evidence tended to focus the jury's attention unduly on it. The court correctly stated the rule that an admission by a party could be used not only to affect his credibility but also to establish proof of matters stated therein. *Pluhowsky* v. *New Haven,* 151 Conn. 337, 343, 197 A.2d 645; *Sears* v. *Curtis,* 147 Conn. 311, 316, 160 A.2d 742. The instruction as given was only applicable to the defendant and was therefore proper.

The defendant introduced various witnesses who testified as to the defendant's general reputation in the community for truth and veracity and also as to their own personal opinion as to these character traits. The court charged at some length on the subject of general reputation. A portion of this part of the charge stated: "On a doubtful question, good reputation alone might be sufficient to raise a reasonable doubt as to the guilt of the accused." The court ended this portion of the charge by saying: "It must be a general reputation representing a concensus of the common feeling of his fellows as to him." The defendant's claim of error is that the court also should have charged that "good

character evidence need not be limited to a person's general character in the community, but may likewise be relevant and properly presented through the testimony of the opinion of a given individual as to that character." The defendant's criticism of the charge is that evidence of traits of character offered by one who has knowledge of those traits is also admissible in evidence in addition to evidence of general character. *Richmond* v. *Norwich,* 96 Conn. 582, 596, 115 A. 11. With regard to evidence of reputation, the charge was correct. *State* v. *Blake,* 157 Conn. 99, 104, 249 A.2d 232; *State* v. *Alderman,* 83 Conn. 597, 602, 78 A. 331. While the defendant did offer evidence of a personal trait for truth and veracity, the record does not reveal any request for a specific charge on this phase of the evidence. Under the circumstances, it was not error to omit reference to it from the charge. *State* v. *Penn,* 144 Conn. 148, 153, 127 A.2d 833.

The charge concerning the elements of knowledge and concealment necessary for conviction of the charge of receiving stolen goods is attacked by the defendant on the ground that the court improperly and unfairly commented on the evidence. The claim that the evidence was insufficient to warrant the charge is commented on in the portion of the opinion discussing the denial of the defendant's motion for judgment.

General Statutes § 53-65 provides that a criminal offense is committed by "[a]ny person who receives and conceals any stolen goods or articles, knowing them to be stolen." The essential elements of the crime are: "(1) The property must have been stolen. (2) It must have been received by the accused with the knowledge that it was stolen. (3) It must have been concealed within the meaning of the law. (4) It must have been received and concealed by the accused with a felonious intent, that is, a criminal intent to deprive the true owner of his property." *State* v. *Palkimas,* 153 Conn. 555, 558, 219 A.2d 220; see also *State* v. *Alderman,*

supra, 600. In commenting on the necessary element of the statute, that the television set must have been received with knowledge that it was stolen, the court stated that the state was relying on circumstantial evidence to prove knowledge. It cautioned the jury that carelessness of the accused in ascertaining the facts was not enough, but that they must find actual knowledge on his part at the time the television set was received. It then commented on the claims of the state relevant to knowledge.[3] The court commented on the claims

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[3] "Knowledge of the fact that the television set was stolen at the time when it was received can be inferred from the circumstances if they were such that a reasonable man of honest intentions should have come to that conclusion. On this element of the case the State claims that you have the right to draw an inference of knowledge from Paul Moynahan's admission that in 1965 he was at the home of Charles Vernale to investigate the theft of two TV sets and that these were later removed from the home of Charles Vernale by the State Police. The State also asks you to infer knowledge that the set in question, that is, Exhibit K, was stolen from the statements allegedly made by Paul Moynahan to Charles Vernale and to John Bishop to the effect that, 'Whatever business dealings you have is your business but if you do anything in Waterbury, I will have to nail you for it.'

"If you find that such a statement was made by Paul Moynahan and that he did participate in an investigation where stolen goods were recovered from the home of Charles Vernale in 1965, you may draw the inference that he, Paul Moynahan, knew that Charles Vernale and John Bishop were engaged in nefarious business activities, and that he, Paul Moynahan, as a reasonable man with honest intentions should have known that the TV set, Exhibit K, was stolen at the time that it was allegedly delivered to him and allegedly received by him.

"The State also makes the claim that the entire personal and social relationship between Paul Moynahan and Charles Vernale was such that Paul Moynahan knew that Charles Vernale was dealing in merchandise stolen by John Bishop and from this relationship Paul Moynahan, as a reasonable man with honest intentions, should have known that the TV set, Exhibit K, was stolen when it was received by him, providing, of course, you do find that it was in fact received by him."

of the defendant and further stated that if the knowledge was gained after the defendant came into possession of the television set, there could be no conviction.

Although the defendant makes other claims in his brief, the exception to this portion of the charge when made was limited to the claim that if the facts as stated were proven, each fact "standing by itself" would be insufficient as a matter of law to support a finding of knowledge. It is clear that the court combined the first two claims, and charged that if the jury found that the defendant did tell Bishop that he knew of his activities and if they found that the defendant did participate in recovery of stolen goods from the home of Vernale in 1965, an inference could be made that the defendant, as a reasonable man with honest intentions, should have known the set was stolen. The second reference in the charge alluded to the state's claim that through the entire personal and social relationship with Vernale, the defendant should have known that the television set was stolen. That knowledge of a fact may be inferred from other facts proven is a well-settled rule of evidence. The policy consideration underlying this rule is that frequently the only method of establishing what lay in the mind of a person when he performed an act is through such an inference. Circumstantial evidence is offered and received for this purpose and jurors are properly told that they may, not that they must, infer knowledge, intent, or mental state or condition from such facts. The purpose of the language in the charge was to instruct the jury that they were not to find guilty knowledge from these facts unless the defendant, as a reasonable man, should, from the same facts, have inferred at the time he received them that the goods were stolen. *State* v. *Pambianchi*, 139 Conn. 543, 546, 95 A.2d 695; *State* v. *Weiner*, 84 Conn. 411, 416, 417, 80 A. 198. This rule also applied to the second claim of the state as charged by the court. See *State* v. *Fredericks*, 149 Conn. 121, 124, 176 A.2d 581; *State* v. *Heno*, 119 Conn. 29, 32, 174 A. 181; *State* v. *Kaplan*, 72 Conn. 635, 45 A. 1018; *People*

v. *Estrada*, 256 Cal. App. 2d 136, 157, 44 Cal. Rptr. 165; 66 Am. Jur. 2d, Receiving Stolen Property, § 25; note, 147 A.L.R. 1058. The court, by the use of the words "you may draw the inference," left the issue of the defendant's knowledge that the set was stolen to the jury. The court's charge on the issue of knowledge was proper.

The defendant excepted to the instruction in the charge on the necessary element of concealment contained in the statute,[4] first claiming that if the television set was

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[4] "Now, the third element of the crime of receiving stolen goods, you must be satisfied that, having received the goods knowing them to have been stolen, the accused concealed them. 'Concealed' as used in this statute has somewhat a broader meaning than that which one ordinarily uses the word, that is, to hide. It, of course, includes that, but the requirement of concealment is met if the accused did anything which would make the discovery or identification of the property more difficult.

"On this element of the crime of receiving stolen property, evidence has been offered by the State to indicate that the TV set was placed in the home of Paul Moynahan in a sun porch away from the view of the general public. If you accept such testimony and find it to have been proven beyond a reasonable doubt, you can conclude that the TV set was concealed within the meaning of our law.

"There is also evidence before you to the effect that the police found smashed parts of the TV set in an isolated Greystone section of Terryville in the Town of Plymouth. Again, if you accept this testimony beyond a reasonable doubt, you can find that something was done to the set which made it more difficult to be discovered or identified.

"The act of smashing a TV set, if you find that such was the case here, constitutes an act of concealment within the meaning and intent of the statute relating to the crime of receiving stolen goods. On the other hand, if you find that the TV set and the component parts thereof which have been offered by the State in evidence was not delivered to the home of Paul Moynahan, and that Paul Moynahan did not smash the set, you must, of course, come to the conclusion that he could not have concealed it. In this event the essential elements of concealment will not have been proved by the State beyond a reasonable doubt, and again, in that event your verdict must be in his favor."

smashed, the act of smashing must have "coalesced" in time with receipt of the set in order to prove concealment and secondly asserting that placing the set on the sun porch was not a concealment as a matter of law.

The word "conceals" in the statute was not used in a technical sense but includes all acts done which render the discovery or identification of property more difficult. *State* v. *Ward,* 49 Conn. 429, 442; *Wertheimer* v. *State,* 201 Ind. 572, 169 N.E. 40. The court's charge that the jury could conclude that the TV set was concealed if it believed testimony that the television set was placed by the defendant in a sun porch of his private home out of the view of the general public was correct. Concealment is not limited to proof that the stolen property was hidden or kept out of sight, it is enough if it is proven that the property was withheld from the owner and made difficult for the owner to discover and this includes acts or conduct which enables the one who received the stolen goods to convert the property to his own use. *Commonwealth* v. *Matheson,* 328 Mass. 371, 103 N.E.2d 714; *State* v. *Crum,* 255 La. 60, 229 So. 2d 700; *Wertheimer* v. *State,* supra; 66 Am. Jur. 2d, Receiving Stolen Property, § 4.

The smashing of the television set was not an act that must have occurred when the set was received in order to be concealment within the meaning of the statute as claimed by the defendant. If the act of smashing the television set was found by the jury to have been accomplished by the defendant, it was an act "done which rendered the discovery or identification of the property more difficult." *State* v. *Ward* supra. The court was not in error in charging as it did on the two elements of knowledge and concealment.

III

The record reveals forty-four exceptions to court rulings occurring during the course of the trial. Only those assignments of error which merit comment will be discussed.

At the trial the state offered the testimony of Captain Bishop of the Connecticut state police regarding an interview with the defendant, conducted in the state's attorney's office in Waterbury in the presence of the state's attorney, Superintendent Sullivan of the Waterbury police department and two state police officers. The interview was recorded and a verbatim transcript was made and delivered to the defendant prior to trial. The state examined Captain Bishop as to his recollection of this interview. The defendant objected to this testimony, claiming that the transcript of the recorded interview was the best evidence. A distinction must be drawn between a case in which proof of the document is essential and one in which the document is only collaterally involved. The best evidence rule has no application to the present case because the state was not attempting to establish the existence or the exact terms and contents of the verbatim transcript. The questions sought to discover what the witness had said during the interview. Anyone who has heard an oral statement made and remembers it may testify to what was said. *Brzezinski* v. *United States,* 198 F. 65, 66 (2d Cir.). Captain Bishop was not asked what the transcript contained but what the defendant had said in the interview. Where one testifies to what he has seen or heard, such testimony is primary evidence regardless of whether such facts are reduced to writing. While recordings might be more accurate and reliable evidence under ordinary circumstances than testimony from memory, the latter is not rendered incompetent by the fact of the existence of the former. *People* v. *Kulwin,* 102 Cal. App. 2d 104, 226 P.2d 672. The defendant has misinterpreted the applicability and

purposes of the best evidence rule. *Farr* v. *Zoning Board of Appeals,* 139 Conn. 577, 582, 95 A.2d 792; *Kilpatrick* v. *Kilpatrick,* 123 Conn. 218, 225, 193 A. 765; 29 Am. Jur. 2d, Evidence, § 449. The defendant's brief points out suggested inconsistencies between the testimony of Captain Bishop and the actual contents of the statements as shown by the transcript. At all times, however, the defendant had possession of the entire transcript of the interview and, following proper procedure, could have used it in cross-examination to show discrepancies in any of the testimony given concerning this interview. Further, the use of the recording or the transcript of the recording would have run the risk of the prejudicial effect cautioned against in *State* v. *Mortoro,* 160 Conn. 378, 390, 279 A.2d 546. The court was not in error in its ruling.

During the course of the trial the state informed the court that it intended to call Vernale as a witness. The state had contended that Vernale transferred a stolen television set to the defendant. Representing to the court that it could not vouch for the veracity of Vernale, the state requested that the court call him as a court's witness. The court refused, and instructed the state's attorney to call Vernale as a state's witness. Counsel for the defendant moved that the court make inquiry in the absence of the jury to determine if Vernale intended to invoke his fifth amendment privilege against self-incrimination. The motion was denied and an exception was taken. The court was then informed that Vernale's counsel had advised him to claim the privilege. The state represented to the court that Vernale had made contradictory statements under oath and that it did not know what his testimony would be and that his attorney had advised the state that he did not know what his client would do if called as a witness. The court then summoned the jury. Vernale was called as a witness for the state. Under questioning by the state Vernale stated he was then at the state prison; that

he knew the defendant; that he had known the defendant for six or seven years; that his relationship with the defendant was strictly one of friendship; that he considered the defendant one of his friends and he pointed out the defendant to the court. When asked what his friendship involved, he stated he would take the Fifth Amendment on that for the simple reason I don't want to incriminate myself in any way. This is not by [sic] trial." He was then asked if he ever was an informant for the defendant. He answered he was never an informant. He was asked if he had given information on any criminal activities. He refused to answer. He was then asked: "Did you ever make a gift of a television set, a color television set to Moynahan?" He stated: "I take the Fifth Amendment on that. I don't want to incriminate myself." The state asked no further questions. The court ordered the state to reveal to the defendant evidence in its possession concerning Vernale which might be of material importance to the defense. Thereafter Vernale was cross-examined about the extent and the length of time of his friendship with the defendant; of his trip to Florida and his return with the defendant. He was then asked about his refusal to answer the question of whether he ever gave the defendant a television set. He replied: "That is right." He was then asked if he would take the fifth amendment on any inquiry about television sets and he replied in the negative and stated he was "willing to plead guilty for receiving stolen goods." He was then asked: "So you are willing to testify to some things and not to others?" He replied: "That is in my case. I do not want to incriminate myself. That is the only reason I took the Fifth Amendment." During the charge, the court gave cautionary instructions to the jury that no adverse inferences against the defendant should be drawn from Vernale's refusal to answer some questions.

The defendant objected and took an exception only to the court's refusal to interrogate Vernale in the absence of

the jury to determine if he would take the privilege. Ordinarily, the claim of error would be dismissed as no such practice is required under our procedure and would not have been efficacious in any event. *Commonwealth* v. *Martino*, Mass. , 282 N.E.2d 647. The defendant, however, did alert the court to the constitutional problems which would arise if the state was allowed to call a witness who intended to refuse to answer questions. The errors claimed in the assignments of error which are briefed are, therefore, considered. *State* v. *Vars*, 154 Conn. 255, 271-72, 224 A.2d 744.

A prosecutor or state's attorney, in a criminal case, may not call anyone who, in any capacity, has become so involved in the defendant's criminal activities as to be liable to prosecution for the same offense or for another offense growing out of the transaction from which the defendant's alleged offenses arise, with a design or purpose of extracting a claim of privilege against self-incrimination. *United States* v. *Tucker*, 267 F.2d 212 (3d Cir.); *Vandergrift* v. *State*, 237 Md. 305, 206 A.2d 250; *People* v. *Pollack*, 21 N.Y.2d 206, 234 N.E.2d 223; see note, 86 A.L.R.2d 1443-59. In considering the constitutional question presented when the prosecution questions witnesses who elect to claim the fifth amendment privilege against self-incrimination, the Supreme Court in *Namet* v. *United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278, noted that two factors had been focused on by trial courts to determine whether such conduct was prejudicial error. The Supreme Court pointed out that some courts found that error may be based on prosecutorial misconduct, that is, a conscious and flagrant attempt by the prosecution to build its cases out of inferences arising from use of testimonial privelege. The second theory adopted by trial courts based a finding of error on the fact that inferences from a witness' refusal to answer added critical weight to the prosecution's case

in a form not subject to cross-examination, and thus unfairly prejudiced the defendant. *Namet* v. *United States*, supra, 186-87. The court in the *Namet* case pointed out that the few claims of privilege in that case were not the only source or even the chief source of the inference of criminal activity.

That portion of the defendant's brief relating to this claim is devoted chiefly to the conduct of the state's attorney. The record does not support any inference of prosecutorial misconduct. There was full disclosure in advance of Vernale's appearance and full discussion of the merits of the issue and procedure to be followed. The state was in a dilemma in that Vernale was a witness that the state would naturally produce and one whom it had power to produce and his absence would be subject to an unfavorable inference under the rule as set forth in *Secondino* v. *New Haven Gas Co.*, 147 Conn. 672, 675, 165 A.2d 598; *Queen* v. *Gagliola*, 162 Conn. 164, 168, 292 A.2d 890; see also *United States* v. *Gernie*, 252 F.2d 664 (2d Cir.). The state revealed that it could not know to what Vernale would testify and when the witness did refuse to testify the state did not continue to seek answers involving the issue of the television set on which the witness had claimed the privilege. The state's action in the case before us was a far cry from that of the prosecution in *Douglas* v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, relied on by the defendant. The *Douglas* case involved flagrant impropriety on the part of the prosecutor who read an accomplice's confession bit by bit in the form of questions, pausing to ask the witness after each piece: "Did you make that statement?" and thereby compelling repeated reliance on the witness' claim of privilege.

Viewing the entire record, the possible inferences from Vernale's refusal to testify did not add critical weight to the state's case in a form not subject to cross-examination.

The witness' selective use of the privilege on direct examination and the extent of Vernale's testimony during cross-examination, especially when asked directly why he refused to answer, demonstrate that the state was not using Vernale's invocation of the privilege in an improper manner. Furthermore, it cannot be said here that these claims of privilege were the only source or the chief source of the inference of criminal activity. *Namet* v. *United States*, supra, 189; *United States* v. *Jenkins*, 442 F.2d 429 (5th Cir.); *United States ex rel. Fournier v. Pinto*, 408 F.2d 539 (3d Cir.), habeas corpus granted due to a combination of the prosecutor's misconduct and error in the charge. The court's cautionary charge on this issue to the jury was curative of any prejudice which might possibly have arisen because of this witness' claim of privilege. No error was committed in allowing the testimony of Vernale to the extent it was given.

After Miller had testified for the state and had identified the television set in evidence as the set he had repaired at the home of the defendant, counsel for the defendant stated he intended to cross-examine the witness "to establish a fixed motive in his mind which would be indicative of untruthfulness." Thereafter, an extensive cross-examination followed. The defendant has assigned error in six instances concerning this examination. The line of inquiry which the defedant claims he was not allowed to follow was intentionally abandoned after Miller had been questioned in the absence of the jury, and therefore the claim that cross-examination was unduly restricted is utterly without merit.

The defendant also claims that the court was in error concerning the offer of the testimony of two persons who, the defendant claimed, purchased from Miller television sets which later were discovered to have been stolen. The defendant established, while cross-examining Miller, that

in 1967 he sold two television sets which he had obtained from Vernale. One set was sold to Mr. Sterena [sic] and the other to Mr. Gaspari. The offer of proof by the defendant was that both witnesses would testify that the sets they bought from Miller were later confiscated and impounded by the police as stolen sets. The court sustained the objection by the state to such evidence on the ground that it went into collateral matters. Counsel for the defendant admitted that the offered evidence would not go to prove that Miller knew the sets were stolen, and therefore the claim that such sales were admissible on the theory of bias cannot be supported. The purpose claimed for the evidence was for negative inferences, that is, if Miller did not know the sets he obtained from Vernale were stolen, such proof would help to undermine the inference that the defendant knew the set he received was stolen. The defendant also claimed the evidence was offered to "rebut" Bishop's testimony with regard to the size of sets he had stolen. The ruling of the court was correct. "The trier has wide discretion in ruling on the relevancy of evidence. *State* v. *Towles,* 155 Conn. 516, 523, 235 A.2d 639, and cases cited. It is a reasonable exercise of judicial discretion to exclude questions which would introduce issues foreign to the case; *State* v. *Dortch,* 139 Conn. 317, 325, 93 A.2d 490; or evidence the relevancy of which appears to be so slight and inconsequential that to admit it would distract attention which should be concentrated on vital issues of the case. *State* v. *Bassett,* 151 Conn. 547, 551, 200 A.2d 473." *State* v. *Mahmood,* 158 Conn. 536, 540, 265 A.2d 83.

At the close of the direct testimony of Miller and of Vernale the defendant moved for all prior statements and investigatory inquiry testimony of these witnesses. The finding indicates that as to Miller an order was made in chambers instructing the state to turn over any matter which might be of assistance to the defendant. The record is silent with regard to the exact terms of the order or

what was turned over to the defendant. The transcript of Miller's testimony has been examined and it is silent as to any order or, if one was given, what was received pursuant to it. The state's brief indicates that it turned over to the defendant previous statements of Miller as well as relevant testimony of Miller before the investigatory inquiry. The record and the defendant's brief indicate that the state did turn over some prior statements of Miller. The order made in chambers as stated in the findings has not been challenged by either party.

As to Vernale, the court ordered the state "to disclose to Mr. Hennessey evidence in its exclusive possession which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at the trial." This order apparently was grounded on the separate opinion of Justice Fortas in *Giles* v. *Maryland*, 386 U.S. 66, 98, 87 S. Ct. 793, 17 L. Ed. 2d 737, one of the three opinions making up the majority in that case. There is nothing in the record or in the defendant's claims that indicates that the state did not comply with the orders of the court as given in either instance.

On receipt of Vernale's statements made prior to trial, the defendant made a motion for mistrial or dismissal on the ground that the materials furnished were exculpatory and should have been given prior to trial when demanded by pretrial motion for disclosure. The pretrial orders were restricted to exculpatory materials only and not to such evidence which would be an aid generally to the defendant. The defendant has not pointed to any evidence which he received during the trial which tends logically to exculpate the defendant and justifies a motion to dismiss or a motion for mistrial based on the state's failure to provide exculpatory evidence under the pretrial order.

The claim that the court erred in allowing the state to determine which statements to turn over to the defendant is a more difficult question to resolve because the record does not contain a full account of the proceeding. It is evident, however, that at least as far as Vernale was concerned, the state, in compliance with the court's order, did not turn over all of Vernale's statements made prior to trial or all of his testimony before the investigatory inquiry. The defendant claims that he had a right to examine all such statements and that he, rather than the state, should make the determination from the materials of what information would aid him in his defense, and that the court should at least have made an in-camera inspection of materials claimed by the state to be exempt.

The defendant relies heavily on the case of *Dennis* v. *United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 972. In the *Dennis* case the decision is in part based on Rule 6(e) of the Federal Rules of Criminal Procedure which grants to the trial court power to direct disclosure of grand jury testimony. See the cases collected in annotations in 3 A.L.R. Fed. 29 and 5 A.L.R.3d 819. Connecticut has no comparable rule. See the cases collected in 20 A.L.R.3d 7, involving grand juries.

Under our law an accused is not entitled to disclosure of the minutes of a constitutional grand jury proceeding merely for assistance in preparing a defense. *State* v. *Hayes*, 127 Conn. 543, 579-80, 18 A.2d 895. Where an investigatory inquiry has been made, by authority of General Statutes § 54-47, only the testimony of an accused is given to him as a matter of right. Although at the time of trial §§ 54-86(a) and (b) were in existence, we need not determine whether these sections of the statute were purely procedural in nature and therefore not binding on the Superior Court; *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863; because the defendant had his

own testimony taken at the inquiry by virtue of the right under § 54-47 and because the order of the court was more sweeping in favor of the defendant and was based not on the statute, but, as previously stated, followed Justice Fortas' opinion in *Giles* v. *Maryland, supra.*

As we had no rules of procedure governing discovery in criminal cases at the time this case was tried,[5] the action of the court is to be determined by the standard of due process guaranteed by the fourteenth amendment of the United States constitution as expressed in such cases as *Giles* v. *Maryland, supra, Miller* v. *Pate,* 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690, *Brady* v. *Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215. While the state has an obligation not to suppress any evidence which would materially aid a defendant's case, there is nothing in the record, in the appendices or in the briefs to indicate that any such evidence was withheld or that the state did not comply with the order of the court. The heart of the holding in the *Brady* case is the prosecution's suppression of evidence in the face of a defense production request where the evidence is favorable to the accused and is material either to guilt or to punishment. Important then, are (a) suppression, (b) evidence favorable to the defense and (c) materiality. These are the standards by which the prosecution's conduct is to be measured. *Moore* v. *Illinois,* 408 U.S. 786, 794, 795, 92 S. Ct. 2562, 33 L. Ed. 2d 706. The *Brady* case does not require the prosecutor to permit the defendant to examine the prosecution's file to determine what is favorable. See *United States* v. *Evanchik,* 413 F.2d 950 (2d Cir.). While the defendant has shown that all statements of the witnesses were not given to the defense, he has not demonstrated that any favorable evidence material to issues of guilt or punishment was suppressed and has, therefore, failed to show a violation of the principle of the *Brady* case and *Napue* v. *Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217. Since it has not been shown that the defendant's due

[5] Chapter 22A of the Practice Book, Discovery in Criminal Cases, became effective October 1, 1972.

process rights were denied by the state's action, this court cannot base a finding of error on the unsupported speculation of the defense that materials relevant to the issues of guilt or punishment favorable to the defendant were withheld by the state and would have been discovered had an in-camera inspection by the trial court been held.

The defendant vigorously objected to and excepted to testimony offered by the state concerning acts and statements of the defendant which the state claimed were admissible as evidence tending to show a consciousness of guilt. In the absence of the jury, the state informed the court of the nature of the evidence which it proposed to present. The defendant objected and also requested that a "dry run" of the evidence be presented to the court in the absence of the jury. The court denied the request and allowed the state to proceed with its evidence. Edward Courtney, a state police sergeant, testified that on the evening of March 10, 1969, he was visited at his home by the defendant and Henry Byrnes, the chief of detectives of the Waterbury police, and that for a month prior to that date he had been assigned with a team of investigators to investigate a stolen goods ring in the city of Waterbury. He further testified that when the defendant and Byrnes arrived at his home he entered the defendant's automobile and while there was asked in a boisterous and argumentative tone by the defendant if he had said he was out "to get" the defendant. Courtney testified that he denied making the statement and that the defendant at that time was yelling and pointing his finger at Courtney. The substance of the conversation which followed was that if Courtney wanted the defendant, Courtney could have him right on the street there; the defendant stated that the state's attorney was trying to tie him with another to Vernale and to place him with a stolen television set from Vernale; the defendant further said television sets were small items and insurance companies pay off on them. The defendant also told Courtney in a loud voice that policemen should protect policemen, not persecute them; the defendant denied ever taking

anything from Vernale or anyone else and at some point in the conversation the defendant's references were to the entire Waterbury police department. During his testimony, Courtney was asked if obscenities were used by the defendant to refer to Captain Bishop and the state's attorney and Courtney stated there were and repeated them.

The state then produced two state police officers, and state's attorney Francis McDonald and his wife, to relate an incident at McDonald's home on the same evening at about 1:30 a.m. following the earlier encounter between the defendant and Courtney. McDonald testified that prior to that evening he had been present when the defendant was interviewed by Captain Bishop at which time the defendant was advised that allegations had been made that he had received stolen property from a fence, Vernale. In substance, the testimony of the state's attorney was that the defendant and Byrnes went to the state's attorney's home about 1:30 a.m. on March 11, 1969. The defendant banged on the door and awoke the McDonald family. He called to the second-floor window and stated who he was and stated he wanted to talk to McDonald. At that time he spoke in a loud, challenging, voice. McDonald called the state police. Until the police came, the pounding continued and at one time the defendant stated: "Frank, Frank, I want to talk to you. Come down. Come down, you hero, you. Come down." McDonald, his wife and three children were frightened by the episode. When the state police arrived they found the defendant and Byrnes outside the McDonald home. The defendant seemed excited and stated he wanted to talk to McDonald but that the latter, whom he referred to in obscenities, did not have the guts to talk to him. Byrnes appeared intoxicated but the defendant, although he had a moderate odor of alcohol, was able to speak clearly.

In a criminal trial, it is relevant to show the conduct of an accused, as well as any statement made by him subsequent to the alleged criminal act, which may fairly be inferred to have been influenced by the criminal act. *State* v.

Cronin, 64 Conn. 293, 304-5, 29 A. 536. The state of mind which is characterized as "guilty consciousness" or "consciousness of guilt" is strong evidence that the person is indeed guilty; 2 Wigmore, Evidence (3d Ed.) § 273; and, under proper safeguards, hereinafter discussed, is admissible evidence against an accused. *United States* v. *Friedman,* 445 F.2d 1076, 1081 (9th Cir.); *Harrell* v. *United States,* 220 F.2d 516 (5th Cir.); *State* v. *Holliday,* 159 Conn. 169, 268 A.2d 368; *State* v. *Leopold,* 110 Conn. 55, 66-67, 147 A. 118; *In re Durant,* 80 Conn. 140, 151, 67 A. 497; *State* v. *Caliendo,* 136 Me. 169, 4 A.2d 837; *State* v. *Mills,* 51 N.J. 277, 240 A.2d 1, *cert. denied,* 393 U.S. 832, 89 S. Ct. 105, 21 L. Ed. 2d 104; 1 Wharton, Criminal Evidence (12th Ed.) § 209. The defendant relies strongly on the case of *Gawn* v. *State,* 13 Ohio C.C.R. 116, 7 Ohio C. Dec. 19, for the proposition that acts or statements against a prosecutor should be inadmissible. See also 22A C.J.S., Criminal Law, § 636. In that case, however, at the time threats against the prosecutor were made, the accused had no reason to anticipate that he was to be accused and under those conditions his threats could not be a manifestation of a "consciousness of guilt." Note, 8 A.L.R. 1361. In addition, the threats in the *Gawn* case were an attempt to prevent prosecution of another individual not the defendant in the case.

The defendant argues that he was not under arrest and that his acts and statements were mostly an argument with a police officer and a desire to get an investigation moving rather than to suppress it. Without repeating the recital of facts previously stated, it is clear that such evidence would indicate a "consciousness of guilt," since the defendant knew at the time that the investigation was centered on his activities and on himself. Furthermore, the defendant was given every opportunity to present his version of the incident to the jury which simply did not accept his explanation of the nocturnal visitation.

Before evidence is allowed to be given, however, the court must also consider whether its prejudicial tendency outweighs its probative value. *State* v. *Marquez,* 160 Conn. 47, 52, 273 A.2d 689; *State* v. *Johnson,* 160 Conn. 28, 33, 273 A.2d 702; *State* v. *Holliday, supra,* 173. Not only was evidence given which could be interpreted as an effort on the part of the defendant to influence the state's attorney, but evidence was also given as to the effect of the defendant's conduct on the wife and children of the state's attorney. If such evidence had no probative force or was of inconsequential value to the state in the proof of the defendant's guilt, then, of course, it should not have been admitted because of its prejudicial effect. In view, however, of the defendant's claim that his acts and statements did not constitute conduct evincing consciousness of guilt, the state was justified in showing the actual statements made, the manner in which they were made and the intensity and duration of the acts. The effect of these actions on the persons he reasonably could expect would be affected was relevant to show the manner, intensity and duration of such conduct, all of which tended to show the defendant's state of mind, that is, his consciousness of guilt. This evidence was also reasonably necessary since the only direct evidence of the defendant's guilt was testimony of a felon whose veracity could be questioned and subjected to disbelief by a jury. Balancing this probative value against any prejudicial effect the evidence might have had, the court was not in error in allowing the state to produce this evidence. McCormick, Evidence § 157, pp. 332-33; 6 Wigmore, Evidence (3d Ed.) § 1904; 1 Wharton, Criminal Evidence (12th Ed.) § 151; see also *State* v. *Holliday,* 159 Conn. 169, 173, 268 A.2d 368.; *Thibodeau* v. *Connecticut Co.,* 139 Conn. 9, 14, 89 A.2d 223.

The defendant claims error in the court's ruling during the cross-examination of Timothy Moynahan, the defendant's son, which admitted evidence concerning his arrest as proof of bias, interest and motive. A claim of error in

the admission of evidence is to be tested by the finding. Practice Book § 648; *State* v. *Harris*, 147 Conn. 589, 599, 164 A.2d 399; *Facey* v. *Merkle*, 146 Conn. 129, 131, 148 A.2d 261. The defendant's son testified in his father's behalf. He further testified that he had represented Vernale from 1965 to 1968. During the presentation of the state's case evidence was offered to establish that the defendant's son, Timothy, had received a stolen air conditioner from Vernale. The witness stated that in August, 1967, he opened an office in Watertown and Vernale gave him an air conditioner. In February, 1969, when he first learned it had been stolen, he immediately told the state's attorney and the air conditioner was removed from his office by the state police the next day. On cross-examination Timothy Moynahan was asked: "Attorney Moynahan, is it true that you presently have pending against you in this particular court an information charging you with conspiracy with your father to receive stolen goods?" The state claimed the admissibility of this evidence on the basis of interest, motive and bias, "particularly as there are charges pending from the very same investigation."

The defendant objected on the grounds that (1) the rules governing the right of the defense to cross-examine a state witness are not applicable to the state's claim of right to cross-examine a defense witness; (2) such evidence was not relevant to any issue of bias, interest or motive; and (3) the attempt was to impeach the witness' testimony by attacking credibility through the impermissible vehicle of proof of arrest without a conviction.

The defendant's claim that the scope of cross-examination of defense witnesses is more restricted than the scope of cross-examination of witnesses for the prosecution is without merit. Rules governing the admissibility of evidence are with few exceptions the same for the trial of civil and criminal cases. *State* v. *Parker*, 112 Conn. 39, 54, 151 A. 325; *State* v. *Willis*, 71 Conn. 293, 306, 41 A. 820; 1 Wig-

more, Evidence (3d Ed). § 4 (2); 58 Am. Jur., Witnesses, §§ 611, 616. The right, extent of, and limitation on cross-examination generally was well stated in *Fahey* v. *Clark,* 125 Conn. 44, 3 A.2d 313; see also *Fordiani's Petition,* 99 Conn. 551, 561, 121 A. 796. In *State* v. *Griswold,* 67 Conn. 290, 307, 34 A. 1046, commenting particularly on an accused taking the stand in a criminal case in his own behalf, this court noted that by taking the stand the accused "subjected himself to the same rules, and was called upon to submit to the same tests which could by law be applied to other witnesses. . . . Having elected to become a witness in his own behalf, he occupied for the time being the position of any other witness, with all its duties and obligations." See also *People* v. *Shapiro,* 308 N.Y. 453, 126 N.E.2d 559; 58 Am. Jur., Witnesses, §§ 611, 616. This reasoning must apply as well to witnesses who testify for the defendant.

The two remaining claims, that the evidence was not relevant to any issue of bias, interest or motive and that a witness' testimony may not be impeached by proof of an arrest without conviction, are discussed together.

Evidence of a conviction of a crime where punishment may be more than a one-year-term of imprisonment is admissible in evidence to affect credibility. *Heating Acceptance Corporation* v. *Patterson,* 152 Conn. 467, 472, 208 A.2d 341. Evidence of arrest without conviction, however, is not admissible as evidence to attack the credibility of a witness. *Hayward* v. *Maroney,* 86 Conn. 261, 262, 85 A. 379; *Card* v. *Foot,* 57 Conn. 427, 432, 18 A. 713; see the cases collected in note, 20 A.L.R.2d 1421, 1425 § 3. The offer of evidence that the witness had been arrested was not for the purpose of attacking his credibility, but to show bias, interest and motive. The right to show bias, interest or motive was clearly enunciated in *State* v. *Luzzi,* 147 Conn. 40, 46, 156 A.2d 505, wherein it was stated: "Cross-examination to elicit facts which tend to show motive, interest, bias or prejudice is a matter of right, and although the extent of such cross-

examination may often rest in the sound discretion of the court, a denial of the right, or its undue restriction, will constitute reversible error. . . . It is generally held that cross-examination for this purpose is a substantial legal right which may not be abrogated or abridged at the discretion of the court to the prejudice of the cross-examining party."

In *United States* v. *Dardi,* 330 F.2d 316 (2d Cir.), cert. denied, 379 U.S. 845, 85 S. Ct. 50, 13 L. Ed. 2d 50, it was stated: "While an arrest alone is not normally admissible to impair the credibility of a witness, the fact that it might embitter him so as to motivate him to testify as he has may be relevant." In *People* v. *Barr,* 51 Ill. 2d 50, 280 N.E.2d 708, it is stated: "[T]he fact that a witness has been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to indicate that his testimony might be influenced by interest, bias or a motive to testify falsely." *People* v. *Mason,* 28 Ill. 2d 396, 401, 192 N.E2d 835; see also *Ford* v. *Kremer,* Mass. , 277 N.E.2d 679.

In *Hayward* v. *Maroney,* supra, relied on by the defendant, it was held that the arrest of the plaintiff was not admissible to show bias. An examination of the record and briefs, however, demonstrates that in offering the evidence of the arrest, "[i]t was not stated in what connection any motive or bias was intended to be shown." 124 Rec. & Briefs, p. 298. In *State* v. *Tropiano,* 158 Conn. 412, 426, 262 A.2d 147, cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288, it is indicated that evidence of the not guilty plea of a witness and his subsequent sentencing were matters which were admissible on the ground of motive, interest or bias and it was error on the part of the court to exclude such evidence.

In the present case, Timothy Moynahan was arrested and charged as a coconspirator with his father stemming from the same investigation and involving the same type of criminal behavior and the same informant. Under such circumstances the state had the right to cross-examine him to show whatever bias, interest or prejudice he might have regarding the case. 3 Wigmore, Evidence §§ 949, 967 (Chadbourn Rev., 1970); 58 Am. Jur., Witnesses, § 755; note, 20 A.L.R.2d 1421, 1440 § 7, 1446 § 12. Of course, the effect of such evidence in determining whether the witness was in fact biased or had a motive to falsify his testimony would be for the consideration of the jury. It was for the court to determine whether the prejudicial effect of this evidence would outweigh its probative value. The court did not abuse its discretion in the ruling. *State* v. *Marquez,* 160 Conn. 47, 52, 273 A.2d 689; *State* v. *Johnson,* 160 Conn. 28, 33, 273 A.2d 702.

During the cross-examination of Timothy Moynahan the state brought out that on one occasion he represented Lieutenant Griffin in a negligence suit against Vernale. While this claim was pending he also represented Vernale in a criminal action. The state then interrogated Timothy Moynahan about the canons of professional ethics and particularly Canon 6. Practice Book, p. 4. He was asked if, in his opinion, he violated the canon. The court permitted this question as related to the representation of Vernale. Assuming without deciding that a violation of Canon 6 would not tend to indicate a lack of veracity, the court's action in allowing this limited inquiry was at most harmless error. If the record discloses that the ruling could not reasonably have affected the verdict, it is not harmful and hence not reversible error. *State* v. *Tropiano,* supra; *DeCarufel* v. *Colonial Trust Co.,* 143 Conn. 18, 21, 118 A.2d 798. Examination of the record clearly establishes that defense counsel stated that the inquiry was a legal interpretation of Canon 6 and that there were "a number of legal opinions with respect to the interpretation

of Canon 6 in the particular situation that Mr. Gaffney is inquiring into" and the witness emphatically denied the claim that his conduct violated Canon 6 and no further inquiry was made by the state. It is clear that this evidence was not so prejudicial to the defendant as to affect the verdict. *State* v. *Tropiano,* supra. Further, the record does not show that an exception was taken to the questions. This alone would be dispositive of this assignment of error. *LaVoie* v. *Marshall,* 141 Conn. 681, 688, 109 A.2d 508.

IV

The final claim of the defendant is that the court erred in denying his motion for judgment notwithstanding the verdict because the verdict was not supported by the evidence. This claim is tested by the evidence that appears in the appendices to the briefs. *State* v. *Cofone,* 164 Conn. (34 Conn. L.J., No. 25, pp. 1, 2); *State* v. *Cari,* 163 Conn. 174, A.2d . The appendices not only support the evidence included in the finding but are more extensive. There is no need to repeat the evidence printed in the appendices since the state's claims of proof in the finding are all repeated in the appendices and, if believed by the jury, justified their verdict. It is apparent that there could not have been any serious controversy as to the fact that the described television set was stolen or of its value. The testimony relating to whether the defendant knowingly received and concealed a stolen television set was in direct conflict. From the evidence printed in the appendices, as previously recited, it is apparent that the jury, in the rightful exercise of their province in making reasonable inferences and on passing upon the crediblity of witnesses, including that of the defendant, could have found against the defendant. The evidence offered in this case supported the jury's verdict.

There is no error.

In this opinion the other judges concurred.

Letter of Harold J. Ivey, Clerk, Dated May 25, 1973

STATE OF CONNECTICUT

SUPREME COURT

New Haven, Conn.

May 25, 1973

Edward F. Hennessey
Attorney-at-Law

Please take notice that the Supreme Court has decided the following motion:

#7032 State of Connecticut vs. Paul C. Moynahan

"May 23, 1973. The defendant's motion to reargue is denied. By the Court, House, Chief Justice."

Harold J. Ivey, Clerk

Letter of Francis J. Drumm, Jr., Administrative Assistant, Dated May 23, 1973

SUPREME COURT OF CONNECTICUT

OFFICE OF THE REPORTER OF JUDICIAL DECISIONS

DONALD H. DOWLING — Box 1850
Reporter of Judicial Decisions — Hartford 06101

23 May 1973

Francis J. Butler, Esq.
Clerk, Superior Court
District of Waterbury
7 Kendrick Avenue

Waterbury, Connecticut 06702

Re: State v. Moynahan

Dear Attorney Butler:

Enclosed is an "Amendment to Opinion" in the captioned case. A certified copy of this opinion was mailed by us to your office on Monday, 23 April 1973.

Very truly yours,

Francis J. Drumm, Jr.
Administrative Assistant

FJD/gaf
Encl

cc: Edward F. Hennessey, Esq.
Dennis F. Gaffney, Esq.
Harold J. Ivey, Esq.

Amendment to Opinion

SUPREME COURT OF ERRORS

JANUARY TERM, 1973

STATE OF CONNECTICUT v. PAUL MOYNAHAN

Amendment To Opinion

In the thirtieth paragraph under section III of the opinion beginning, "During the cross-examination of Timothy Moynahan . . . ." delete the following sentence: "Further, the record does not show that an exception was taken to the questions. This alone would be dispositive of this assignment of error. *LaVoie* v. *Marshall*, 141 Conn. 681, 688, 109 A.2d 508."